TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE, PLAINTIFFS IN ERROR,

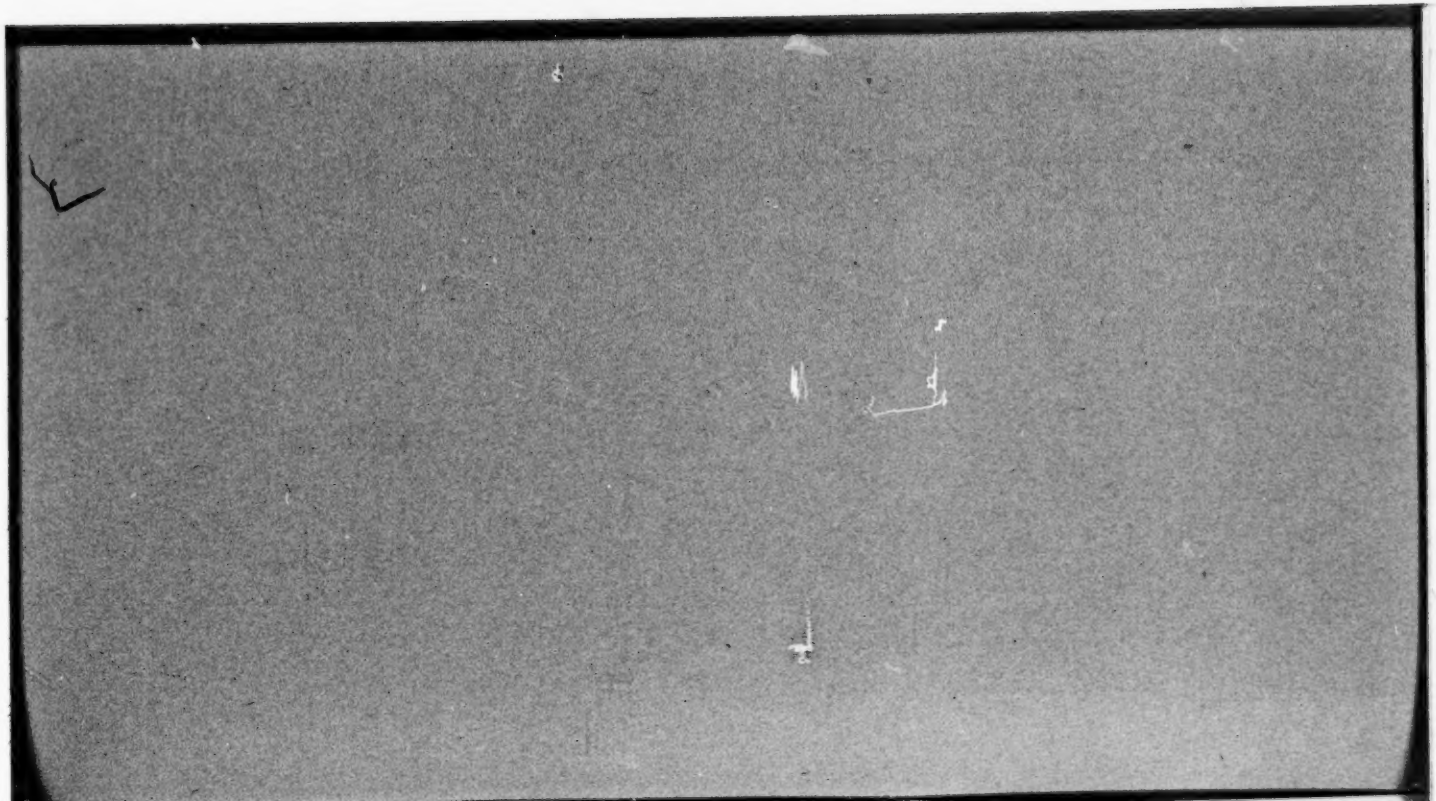
vs.

LOUIS GERSTLEY AND WILLIAM GERSTLEY, SURVIVING PARTNERS OF THE FIRM TRADING AS ROSSKAM, GERSTLEY & COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 19, 1905.

(20,019.)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1906.

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1 In the Court of Appeals of the District of Columbia.

No. 1550.

J. CHARLES MCGUIRE ET AL., Appellants,
vs.
LOUIS GERSTLEY ET AL.

Supreme Court of the District of Columbia.

No. 47367. At Law.

ISAAC ROSSKAM, LOUIS GERSTLEY, and WILLIAM GERSTLEY, Trading as Rosskam, Gerstley & Company, Plaintiffs,
vs.
JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, WILLIAM MCGUIRE, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Declaration.

Filed December 10, 1904.

In the Supreme Court of the District of Columbia.

Law. No. 47367.

ISAAC ROSSKAM, LOUIS GERSTLEY, WILLIAM GERSTLEY, Trading as Rosskam, Gerstley & Company, Plaintiffs,
vs.
JOHN F. MONAGHAN, J. CHARLES MCGUIRE, JOHN W. CLARK, WILLIAM MCGUIRE, Defendants.

The plaintiffs, Isaac Rosskam, Louis Gerstley, William Gerstley, trading as Rosskam, Gerstley & Company, sue the defendants, John F. Monoghan, J. Charles McGuire, John W. Clark and Wil-
2 liam McGuire, for that the defendants heretofore, to wit, on the 11th day of September, 1903, by their certain writing obligatory sealed with their seals, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of $5,000.00 to be paid to the plaintiffs, which said writing obligatory was and is subject to the condition therein written in the words

following: that if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley and Company for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void, otherwise it shall remain in full force and virtue. And the plaintiffs say that thereafter, to wit, on the days set forth in the particulars of demand hereunto annexed, and which are referred to and made a part of this declaration, the defendants, John F. Monaghan and J. Charles McGuire, purchased from the plaintiffs merchandise aggregating the sum of $14,497.16 as shown in said particulars of demand. And the said John F. Monaghan and J. Charles McGuire have paid on account thereof at various times as shown in said particulars of demand, the sum of $9,100.48, leaving a balance overdue and unpaid amounting to $5,396.68. And the plaintiffs say that the said John F. Monaghan and J. Charles McGuire have not paid or caused to be paid to the plaintiffs for merchandise purchased by them from the plaintiffs as aforesaid the moneys due or to become due thereon when and as the same became due and payable and no part of said balance of $5,396.68 has been paid by the defendants or either of them or by any other person, to the damage of the plaintiffs of $5,000.00, wherefore the plaintiffs bring this suit and claim the sum of $5,000.00 with interest, besides costs.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

Know all men by these presents that we, John F. Monaghan and J. Charles McGuire, of the city of Washington, District of Columbia, as principals, and John W. Clark, of the county of Alexandria, State of Virginia, and William McGuire, of the city of Washington, District of Columbia, as sureties, are held and firmly bound unto Isaac Rosskam, Louis Gerstley and William Gerstley, trading as Rosskam, Gerstley and Company in the sum of
3 five thousand (5,000) dollars, lawful money of the United States to be paid to the said Rosskam, Gerstley and Company for which payment well and truly to be made we and each of us do bind ourselves and each of our heirs, executors and administrators, jointly and severally, and firmly by these presents.

Sealed with our seals and dated this 11th day of September, 1903.

Whereas the above bounded John F. Monaghan and J. Charles McGuire are desirous of purchasing merchandise from Rosskam, Gerstley and Company, now and from time to time hereafter, which

the said John F. Monaghan and J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase.

Now, therefore, the condition of the foregoing obligation is such, that if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley and Company, for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void; otherwise it shall remain in full force and virtue.

JOHN F. MONAGHAN. [SEAL.]
J. CHAS. McGUIRE. [SEAL.]
JOHN W. CLARK. [SEAL.]
WM. McGUIRE. [SEAL.]

Signed and sealed in the presence of
LOUIS SMITH.
W. T. WHELAN.

Statement.

Messrs. Monaghan & McGuire, Washington, D. C., to Rosskam, Gerstley & Co., Dr.

1903.			
Sept.	24.	To mdse	$6365.45
Oct.	5.	"	168.79
	7.	"	167.12
	12.	"	15.30
	16.	"	698.19
	19.	"	37.65
	21.	"	190.58
	30.	"	30.26
Nov.	6.	"	14.98
	9.	"	17.25
	11.	"	506.33
	18.	"	256.44
	19.	"	78.28
	25.	"	879.61
	27.	"	37.47
4			
Dec.	2.	To mdse	30.92
	10.	"	1122.93
	14.	"	124.60
	17.	"	770.74
	22.	"	191.37
	23.	"	26.95
	30.	"	613.88
1904.			
Jan'y	18.	"	890.25
	21.	"	160.70

March	2.	"	.....	233.65	
	16.	"	.....	294.75	
April	22.	"	.....	318.24	
May	3.	"	.....	77.14	
	19.	"	.....	.50	
July	11.	"	.....	59.92	
	27.	"	....	96.92	
					$14497.16

Cr.

1903.					
Oct.	27.	By mdse	.....	62.33	
Dec.	9.	cash	....	500.00	
	14.	"	....	500.00	
	30.	"	.....	500.00	
	31.	mdse	.....	70.73	
1904.					
Jan'y	7.	cash	.....	500.00	
	18.	"	.....	500.00	
	21.	"	.....	500.00	
Feb'y	5.	"	....	500.00	
	24.	"	.....	500.00	
	29.	"	....	500.00	
March	16.	"	.....	2000.00	
April	26.	mdse	.....	917 32	
May	3.	"	.....	78.14	
	12.	commission	.....	212.65	
August	2.	mdse	.....	26.65	
October	4.	commission	.....	339.46	
	18.	mdse	.....	685.28	
	26.	commission	.....	170.95	
Nov.	11.	"	.....	36.97	
					9100.48
					$5396.68

5 *Memoranda.*

January 10, 1905.—Pleas of J. Charles and William McGuire, filed.

January 23, 1905.—Demurrer to pleas, filed.

January 27, 1905.—Death of plaintiff Rosskam suggested, judgment by confession against defendant Monaghan for $5000, with interest and costs. Demurrer to pleas of defendants J. Charles, and William McGuire sustained with leave to them to file amended pleas.

Pleas of Defendants.

Filed February 6, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

ISAAC ROSSKAM ET AL., Trading as Rosskam, Gerstley & Company, Plaintiffs,
vs.
JOHN F. MONAGHAN ET AL., Defendants.

1. The defendants, J. Charles McGuire and William McGuire, for a plea to the declaration of the plaintiffs, say that the plaintiffs at the commencement of this suit were and still are indebted to the defendants John F. Monaghan and J. Charles McGuire in the sum of ten thousand dollars ($10,000) for that heretofore, to wit, on the 25th day of August, 1903, the plaintiffs entered into a certain agreement with the said Monaghan and J. Charles McGuire who are hereinafter designated as Monaghan and McGuire, whereby the plaintiffs agreed that, if the said Monaghan and McGuire would form a copartnership for the purpose of carrying on, in the District of Columbia, the business of wholesale liquor dealers and deal in the merchandise, to wit, spirituous liquors, to be furnished by the plaintiffs and would furnish to the plaintiffs a bond in the penal sum of five thousand dollars, with the defendants John W. Clark and William McGuire as sureties therein, conditioned for the payment to the plaintiffs of five thousand dollars of the indebtedness to be incurred by the said Monaghan and McGuire in the purchase by them from the plaintiffs, from time to time, of said merchandise, then and thereupon and in consideration thereof the plaintiffs would sell and furnish to said Monaghan and McGuire whenever requested by them, from time to time, at and for certain prices then specified and agreed upon by the parties to said agreement, the merchandise required in said business and so to be requested by said Monaghan and McGuire, and would allow to said Monaghan and McGuire for the goods so to be requested and required a continuous credit of ten thousand dollars and that said Monaghan and McGuire should sell the same to their customers in said business upon such terms as to time
6 of payment and otherwise as the said Monaghan and McGuire should find and believe to be the best terms obtainable, having in view the establishment and maintenance in said District, of a demand for the plaintiffs' goods and that the said Monaghan and McGuire would not be required to pay for said goods so sold to their customers until they could make collections therefor from their said customers; and it was then understood by and between all the parties to said agreement and as part thereof, that the said Monaghan and McGuire would enter upon said business without means or capital to sustain the same other than the continuous credit aforesaid and that in order to perform their part of said agreement the

said Monaghan and McGuire would be required to make sales of said merchandise to their customers on credit and to be paid for by said customers in periods varying according to circumstances as aforesaid.

Thereupon, to wit, on the date first aforesaid, the said Monaghan and McGuire formed said copartnership for the purpose aforesaid and thereafter furnished to the plaintiffs a bond prepared by the plaintiffs and which the plaintiffs accepted, and entered upon and fully established the business aforesaid and in all respects fully performed their said agreement so far as they were permitted by the plaintiffs to perform the same. At great labor and expense they obtained a large number of customers, to wit, from 70 to 80 customers to whom they sold on the terms aforesaid, goods purchased by them from the plaintiffs and from the 24th day of September, 1903, to the 10th day of December, 1903, the plaintiffs furnished to said Monaghan and McGuire from time to time under said agreement merchandise amounting in the aggregate to $10,617.55 which they sold to their said customers in accordance with the terms of the agreement and understanding aforesaid, excepting only a portion of said merchandise which they returned to and was accepted by the plaintiffs.

The plaintiffs then, to wit, on the 10th day of December, 1903, wrongfully and with the intent to destroy the business so established and to sell goods directly to said customers drew on the said Monaghan and McGuire for the sum of $1,500 on their said account and sent through various banks the draft of the plaintiffs for said amount payable at sight by the said Monaghan and McGuire and immediately thereafter, to wit, on the 11th day of December, 1903, and ever afterward wrongfully refused to furnish merchandise to the said Monaghan and McGuire at the prices aforesaid but demanded a large increase of said prices and thereafter, to wit, on and after the 13th day of January, 1904, wrongfully refused to furnish more goods under said agreement or further to perform said agreement and forced the said Monaghan and McGuire to abandon their said business which they had established at great expense, to wit, an expense of not less than $10,000 and in which their profits were very great; whereby, the plaintiffs wrongfully destroyed the credit and business of said Monaghan and McGuire and violated the
7 said agreement and the said Monaghan and McGuire were and each of them was thereby injured and damaged in the sum of ten thousand dollars for which sum the said J. Charles McGuire claims judgment against the plaintiffs; and these defendants are willing that the same may be set off against the plaintiffs' demand.

2. And the defendants J. Charles McGuire and William McGuire for a further plea to the said declaration say that the plaintiffs at the commencement of this suit were and still are indebted to the defendants John F. Monaghan and J. Charles McGuire in the sum of ten thousand dollars for that heretofore to wit, on the 11th day of September, 1903 the said John F. Monaghan and J. Charles McGuire, who are hereinafter designated as Monaghan and McGuire, entered into a certain agreement with the plaintiffs whereby

the said Monaghan and McGuire agreed to form a copartnership and as such copartners to establish and conduct, in the District of Columbia, the business of wholesale liquor dealers, and in such business to deal in the merchandise, to wit, whiskey and other spirituous liquors made and sold by the plaintiffs, and to give a bond with the defendants John W. Clark and William McGuire as sureties in the sum of five thousand dollars conditioned for the payment by said Monaghan and McGuire for all merchandise to be purchased by them from the plaintiffs on four months' credit, and in consideration thereof the plaintiffs thereby agreed to sell to said Monaghan and McGuire on credit from time to time such of the merchandise aforesaid as they should require in their said business and at and for certain prices then stated by the plaintiffs, and for such merchandise to allow to said Monaghan and McGuire a continuous credit in the sum of ten thousand dollars ($10,000).

And these defendants aver that thereupon, to wit, on the date last aforesaid, the said Monaghan and McGuire did form said copartnership and as such copartners did establish and thereafter conduct in said District of Columbia the business of wholesale liquor dealers and in such business dealt in the merchandise made and sold by the plaintiffs and did give the bond so as aforesaid agreed by them to be given and in all things fully performed the said agreement on their part to be performed; but notwithstanding the premises, the plaintiffs from time to time thereafter and while said agreement was in full force wrongfully refused to sell to said Monaghan and McGuire upon their request merchandise referred to in said agreement at and for the prices therein stated as aforesaid and also wrongfully refused to sell to said Monaghan and McGuire upon their request merchandise referred to in said agreement upon credit not exceeding ten thousand dollars and wholly neglected and refused upon the request of said Monaghan and McGuire to perform the said agreement on the part of the plaintiffs to be performed, whereby the said Monaghan and McGuire were forced to abandon their said business and to lose all the time, money and labor expended by them in and about the same and amounting to not less than ten thousand dollars ($10,000) and were
8 and each of them was injured and damaged in the sum of ten thousand dollars, for which sum the said J. Charles McGuire claims judgment against the plaintiffs; and these defendants are willing that the same may be set off against the demands of the plaintiffs.

LORENZO A. BAILEY,
Attorney for Defendants J. Charles McGuire & William McGuire.

Separate Pleas of the Defendant William McGuire.

1. And the defendant William McGuire, for a further plea to the declaration of the plaintiffs, says that the plaintiffs at the commencement of this suit were and still are indebted to this defendant in the sum of five thousand dollars, for that heretofore, to wit, on the 11th day of September, 1903, this defendant entered into a cer-

tain agreement with the plaintiffs whereby this defendant agreed to set his hand and seal as surety unto the writing obligatory mentioned in said declaration and in consideration thereof the plaintiffs agreed to sell certain merchandise to the defendants John F. Monaghan and J. Charles McGuire who are hereinafter designated as Monaghan and McGuire, at and for certain prices in said agreement specified and also to allow to said Monaghan and McGuire a continuous credit in the sum of ten thousand dollars ($10,000) for such merchandise to be sold to them by the plaintiffs. And thereupon this defendant in full performance of said agreement on his part did set his hand and seal to said writing obligatory but thereafter the plaintiffs wrongfully refused upon request to sell to said Monaghan and McGuire such merchandise at the prices aforesaid or to allow to them a continuous credit in the sum of ten thousand dollars as aforesaid, whereby the said Monaghan and McGuire were prevented from paying for the merchandise mentioned in said declaration and this defendant has incurred great liability and has been injured and damaged in the sum of five thousand dollars, for which sum this defendant claims judgment against the plaintiffs, and is willing that the same may be set off against the demand of the plaintiffs.

2. And the defendant William McGuire for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of said supposed writing obligatory, because he says, that before the making of the said supposed writing obligatory to wit, on the 11th day of September, 1903, the plaintiffs entered into an agreement with the defendants John F. Monaghan and J. Charles McGuire, hereinafter designated as Monaghan and McGuire, whereby, in consideration of the making of said writing obligatory whereby this defendant became bound as a surety as therein set forth, the plaintiffs agreed to sell to the said Monaghan and McGuire the merchandise referred to in said declaration at certain prices and upon certain terms specified in said agreement; but this de-
9 fendant avers that thereafter, to wit, on the 11th day of December, 1903, the plaintiffs without the consent or knowledge of this defendant, entered into another agreement with said Monaghan and McGuire and thereafter, to wit, on the 23rd day of March, 1904, without the knowledge or consent of this defendant the plaintiffs entered into another agreement with the said Monaghan and McGuire, by each of which said other agreements the terms and prices aforesaid were changed, to the prejudice of this defendant, and on and ever after the 11th day of December, 1903, the plaintiffs wrongfully refused to sell to said Monaghan and McGuire merchandise mentioned in the agreement first above mentioned at the prices or upon the terms therein specified, although thereunto duly requested by said Monaghan and McGuire whereby this defendant was wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

3. And the defendant William McGuire, for a further plea to said declaration, says that all and every part of the merchandise purchased from the plaintiffs as alleged in said declaration was so purchased under and according to the terms of certain agreements not

under seal entered into from time to time before and since the 11th day of September, 1903, by and between the plaintiffs and the defendants John F. Monaghan and J. Caarles McGuire and not under or according to the terms of the supposed writing obligatory mentioned in said declaration; wherefore this defendant prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

LORENZO A. BAILEY,
Att'y for Def't Wm. McGuire.

Demurrer.

Filed February 7, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

ISAAC ROSSKAM ET AL.
vs.
JOHN F. MONAGHAN ET AL.

Now comes the plaintiffs by their attorneys and demur to all of the pleas of the defendants J. Charles McGuire and William McGuire and to the separate pleas of the defendant William McGuire, and say that each and every of said pleas are bad in substance.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

10 *Memorandum.*

Among the matters of law to be argued at the hearing of the above demurrer are the following.

1. That a surety cannot set-off a debt due to his principal in an action against the principal and surety.
2. That one member of a partnership cannot set-off a debt due the entire partnership.
3. That no substantial damages are alleged in said pleas.
4. That none of the matters set forth in said pleas are sufficient in law to operate as a release of the surety.

To L. A. Bailey, Esq., attorney for defendants:

Please take notice that we will call the above demurrer to the attention of the court on Friday the 10th day of February, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

WOLF & COHEN,
EUGENE A. JONES,
Attorneys for Plaintiffs.

Additional Pleas of Defendant.

Filed February 21, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

ISAAC ROSSKAM ET AL.
vs.
JOHN F. MONAGHAN ET AL.

4. And this defendant William McGuire for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that prior to the sealing of said writing obligatory the plaintiffs entered into an agreement with the defendants Monaghan and J. Charles McGuire, who are hereinafter designated as Monaghan and McGuire, to sell to the said Monaghan and McGuire the merchandise referred to in said writing obligatory at and for certain prices specified in a letter dated August 25, 1903, and sent by the plaintiffs to said Monaghan and the plaintiffs then represented and caused to be represented to this defendant that the said agreement was applicable to all merchandise to be purchased under said writing obligatory, which said letter was so sent and said representations were so made and caused to be made by the plaintiffs with the intent on their part thereby to induce this defendant to set his seal to said writing obligatory and this defendant believing said repre-
11 sentations to be true and relying thereon did thereupon set his seal to said writing obligatory and thereafter the said Monaghan and McGuire purchased from the plaintiffs merchandise amounting to $14,477.16, and no more, of which the sum of $10,617.55 was for merchandise so purchased at the prices aforesaid and the remainder, $3,859.61 was for merchandise purchased by said Monaghan and McGuire at other prices greatly exceeding the prices first above mentioned; which said last above mentioned purchases were made in pursuance of a certain other agreement which was entered into by and between the plaintiffs and said Monaghan and McGuire on or about the 11th day of December, 1903, but without the consent or knowledge of this defendant. And this defendant further says that the said Monaghan and McGuire have paid to the plaintiffs on account of the said sum of $10,617.55 the sum of $9,100.48 leaving due to the plaintiffs under said writing obligatory the sum of $1,517.07 and no more.

5. And this defendant William McGuire for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says he set his seal to said writing obligatory and permitted the same to be delivered to the plaintiffs upon certain conditions then known to and accepted by the plaintiffs, that is to say, that the plaintiffs

would sell and would agree to sell to the defendants Monaghan and J. Charles McGuire, who are hereinafter designated as Monaghan and McGuire, the merchandise referred to in said writing obligatory at and for certain prices then and before that time, to wit, on August 25, 1903, specified by the plaintiffs and also that the indebtedness of the said Monaghan and McGuire for merchandise to be purchased by them under said writing obligatory would not at any time exceed the sum of $10,000. But this defendant says that the plaintiffs wholly failed to perform said conditions or any of them and in violation thereof refused to sell or to agree to sell said merchandise to said Monaghan and McGuire at and for the prices aforesaid and also permitted the indebtedness of said Monaghan and McGuire referred to in said declaration to be and continue from December 10, 1903, to January 21, 1904, greatly in excess of $10,000, whereby this defendant was wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

6. And this defendant William McGuire for a further plea to the said declaration says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that on or about the date thereof, to wit, September 11, 1903, the defendants John F. Monaghan and J. Charles McGuire entered into a copartnership agreement between themselves to engage in the liquor business under the firm name of Monaghan and McGuire and to deal in the goods of the plaintiffs and during the year 1903 the said Monaghan and McGuire established said business and dealt in said goods with great profit to themselves and to the plaintiffs; that said writing obligatory was delivered to the plaintiffs for the
12 purpose of establishing and maintaining the credit of said Monaghan and McGuire with the plaintiffs and of maintaining said business: But on or about the 12th day of January 1904, the plaintiffs, well knowing the premises and with the intent to secure to themselves the customers and business which had been before that time obtained and established by said Monaghan and McGuire and to sell directly to such customers and thus increase the profits of the plaintiffs, wrongfully enticed and induced the said Monaghan to withdraw from said copartnership and to enter the employ of the plaintiffs and as agent of the plaintiffs to sell their goods to said customers; and thereupon the said Monaghan yielding to said enticement and inducement, did withdraw from said copartnership and did enter the employ of the plaintiffs as and for the purposes aforesaid, and thereby the business of said copartnership was wholly destroyed and said Monaghan and McGuire by reason thereof became and were unable to pay the plaintiffs for the merchandise referred to in said writing obligatory; all which the enticement and inducement by the plaintiffs and their employment of said Monaghan as aforesaid were without the consent or knowledge of this defendant, who was thereby wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

LORENZO A. BAILEY,
Attorney for Defendant William McGuire.

Demurrer to Plea.

Filed February 23, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

ISAAC ROSSKAM ET AL.
vs.
JOHN F. MONAGHAN ET AL.

Now come the plaintiffs by their attorneys and demur to the pleas of the defendant William McGuire, numbered 4, 5, and 6 and filed herein February 21, 1905, and say that each and every of said pleas is bad in substance.

WOLF & COHEN,
EUGENE A. JONES,
Att'ys for Plaintiff.

MEMORANDUM.—Among the matters of law to be argued at the hearing of the above demurrer is the following: That none of the matters set forth in said pleas or any one of them is sufficient in law to operate as a discharge of a surety.

13 To L. A. Bailey, Esq., attorney for defendants:

Please take notice that we shall call the above demurrer to the attention of the court on Friday the 24th instant at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

WOLF & COHEN,
EUGENE A. JONES,
Att'ys for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, *February* 24, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 47367.

LOUIS GERSTLEY, WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company, Pl'ffs,
v.
JOHN F. MONAGHAN, CHARLES MCGUIRE, JOHN W. CLARK, WILLIAM MCGUIRE, Def'ts.

Upon motion of the defendants, the plaintiffs are hereby required to furnish security for costs by filing herein their undertaking with

surety to be approved by the court, or, in lieu thereof, by depositing with the clerk of this court the sum of fifty dollars, within five days.

Whereupon, the demurrers of the plaintiffs to the amended and additional pleas of the defendants, J. Charles McGuire and William McGuire coming on to be heard, it is considered that said demurrers be, and they hereby are sustained; thereupon said defendants say they will stand upon their pleas; whereupon the plaintiffs move for judgment of their demand against said defendants which is granted; therefore it is considered that the plaintiffs recover against said J. Charles McGuire and William McGuire the sum of five thousand dollars ($5,000) with interest thereon from this date, being the money payable by them to the plaintiffs, by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof.

The defendants McGuire note an appeal to the Court of Appeals, and their bond to operate as a supersedeas is fixed in the penal sum of seventy-five hundred dollars ($7,500).

* * * * * * *

14 THURSDAY, *March* 16, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

At Law. No. 47367.

LOUIS GERSTLEY ET AL., Pl'ffs,
vs.
J. CHARLES MCGUIRE ET AL., Def'ts.

Upon motion of the defendant J. Charles McGuire, leave is hereby given him to file a bond for costs on his appeal herein, in the penalty of one hundred dollars.

Memoranda.

March 22, 1905.—Notice of motion for approval of appeal bonds filed.

March 22, 1905.—Appeal bonds filed.

Order for Transcript.

Filed March 24, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47367.

LOUIS GERSTLEY ET AL.
v.
JOHN F. MONAGHAN ET AL.

The clerk will please prepare and certify the transcript of record on the appeal of the defendants J. Charles McGuire and William McGuire, including therein the following, only, viz:

1. Copy of declaration, with notice to plead, copy of bond and statement attached to declaration omitting affidavit.

2. Memoranda as follows:

Memo.: Jan'y 10, 1905, pleas of defendants J. Charles McGuire and William McGuire filed.

Memo.: Jan'y 23, 1905, demurrer of plaintiffs to said pleas filed.

Memo.: Jan'y 27, 1905, death of plaintiff Isaac Rosskam suggested.

Judgment by confession against defendant Monaghan for $5000, with interest and costs. Demurrer of plaintiffs to pleas of defendants J. Charles McGuire and William McGuire sustained with leave to said defendants to file amended pleas.

3. Copy of amended pleas of defendants J. Charles McGuire and William McGuire and separate pleas of defendant William McGuire, all filed February 6, 1905, omitting affidavits; and demurrer
15 filed February 7, 1905, to all said pleas, with memorandum attached to said demurrer.

4. Copy of additional pleas Nos. 4, 5, and 6, of defendant William McGuire, filed February 21, 1904, omitting affidavit; and demurrer, filed February 23, 1905, to said pleas with memorandum attached to said demurrer.

5. Copy of judgment entered February 24, 1905.

6. Copy of order entered March 16, 1905, as to appeal bond of defendant J. Charles McGuire.

7. Memorandum as follows:

Memo.: March 22, 1905, notice under common-law rule 105 filed; appeal bond of defendant J. Charles McGuire $100, for costs and appeal bond of defendant William McGuire $7,500 supersedeas, approved and filed.

8. Copy of this order.

LORENZO A. BAILEY,
Attorney for Defendants J. Charles McGuire and William McGuire.

Received a copy of the foregoing order as to transcript of record, this 24th day of March, 1905.

EUGENE A. JONES,
Attorney for Plaintiffs.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47,367, at law, wherein Isaac Rosskam, Louis Gerstley and William Gerstley, trading as Rosskam, Gerstley & Company, are plaintiffs, and John F. Monaghan *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 2nd day of May, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1550. J. Charles McGuire *et al.*, appellants, *vs.* Louis Gerstley *et al.* Court of Appeals, District of Columbia. Filed May 5, 1905. Henry W. Hodges, Clerk.

15½ THURSDAY, *October 12th, A. D.* 1905.

No. 1550.

J. CHARLES MCGUIRE and WILLIAM MCGUIRE, Appellants,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

The argument in the above entitled cause was commenced by Mr. L. A. Bailey, attorney for the appellants.

FRIDAY, *October 13th, A. D.* 1905.

No. 1550.

J. CHARLES MCGUIRE and WILLIAM MCGUIRE, Appellants,
—
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

The argument in the above entitled cause was continued by Mr. L. A. Bailey, attorney for the appellants, and by Mr. E. A. Jones, attorney for the appellees, and was concluded by Mr. L. A. Bailey, attorney for the appellants.

Both sides are allowed to file additional authorities herein, if so advised.

16 No. 1550.

J. CHARLES McGUIRE and WILLIAM McGUIRE, Appellants,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the court:)

The appellees, Rosskam, Gerstley & Co., brought this action against John F. Monaghan, J. Charles McGuire, John W. Clark, and William McGuire, upon a bond executed by them, under seal, on September 11, 1903, and binding them to the plaintiffs in the sum of $5,000. The purpose and condition of the said bond read as follows:

"Whereas the above bounded John F. Monaghan and J. Charles McGuire are desirous of purchasing merchandise from Rosskam, Gerstley and Company, now and from time to time hereafter, which the said John F. Monaghan and J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase.

"Now, therefore, the condition of the foregoing obligation is such, that if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley and Company, for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void; otherwise it shall remain in full force and virtue."

The declaration alleges that Monaghan and J. Charles McGuire purchased merchandise of the plaintiffs to the amount of $14,497.16, upon which a balance of $5,396.68 is due and unpaid. A statement of the account shows the various items of merchandise with dates of sales, commencing September 24, 1903, and ending July 27, 1904, and also the items and dates of credits allowed.

Judgment by confession was entered against Monaghan January 27, 1905.

On February 6, 1905, J. Charles McGuire and William McGuire filed two joint pleas of set-off. The first of these alleges that plaintiffs are indebted to Monaghan and J. Charles McGuire in the sum of $10,000, for this, that on August 25, 1903, plaintiffs entered into a certain agreement with said Monaghan and McGuire, that if the latter would form a partnership to carry on the business of wholesale liquor dealers in the District of Columbia and deal in the merchandise to be furnished by plaintiffs, and would furnish plaintiffs with a bond in the sum of $5,000, with John W. Clark and William McGuire as sureties, conditioned for the payment of the indebtedness to that amount to be incurred by said Monaghan and McGuire, then plaintiffs would furnish Monaghan and McGuire from time to time, when requested, "and at certain prices then specified and agreed upon by the parties to said agreement," and would allow them a continuous credit of $10,000; and that said Monaghan and McGuire

should sell the same to their customers "upon such terms, as to time and otherwise, as the said Monaghan and McGuire should find and believe to be the best terms attainable, having in view the establishment and maintenance in said District of a demand for the plaintiffs' goods, and that the said Monaghan and McGuire would not be required to pay for said goods so sold to their customers, until they could make collections therefor from their said customers." And it was further understood that said Monaghan and McGuire would enter upon said business without capital other than the continuous credit aforesaid, and that, in order to perform their agreement, they would be compelled to make sales to their customers upon credit, in periods varying according to the circumstances aforesaid; that Monaghan and McGuire formed the said partnership, furnished the said bond, and began business as aforesaid; that at great labor and expense, they obtained about eighty customers, to whom they sold on credit, the goods purchased from plaintiffs. That on December 10,
1903, the plaintiffs, with intent to destroy the business so
17 established, and to sell goods directly to said customers drew upon them for $1,500, and wrongfully refused to furnish them any more goods at the prices agreed upon, but demanded a large increase thereof, and thereby forced them to abandon their business, which they had established at an expense of $10,000, and in which their profits were great. That they thereby destroyed the said business and violated the said agreement to the damage of each of said partners in the sum of $10,000, for which J. Charles McGuire claims judgment against the plaintiffs; and defendants are willing shall be set off against the plaintiffs' demand.

The second plea is substantially of the same effect.

William McGuire subsequently filed three additional pleas.

The first plea sets out, briefly, but substantially, the agreement with Monaghan and McGuire, as recited in the first and second pleas before stated, and that defendant subscribed the bond as surety for them in performance of said agreement. It then alleges that through the breach of the agreement by plaintiffs, Monaghan and McGuire were prevented from paying for the merchandise furnished them, and thereby defendant has been damaged in the sum of $5,000, which he pleads in set-off.

The second additional plea avers the making of the said agreement in consideration of which defendant executed the bond, as in the first plea stated. It then further avers that afterwards, on to wit, December 11, 1903, plaintiff, without the knowledge or consent of defendant, entered into another agreement with Monaghan and McGuire, by which the prices were changed to the prejudice of defendant, and then again refused to sell merchandise to Monaghan and McGuire, whereby defendant was discharged from all liability on said bond.

The third additional plea avers that all of the merchandise described in the bill of particulars was purchased under the terms of certain agreements not under seal, entered into from time to time before and since September 11, 1903, and not under or according to

the terms of the obligations sued on, wherefore defendant has been discharged.

Defendant then filed three additional pleas.

The first of these (numbered 4) alleges the general agreement between plaintiffs and Monaghan and McGuire, and then adds that plaintiffs agreed to sell them goods "at, and for certain prices specified in a letter dated August 25, 1903, and sent by the plaintiffs to said Monaghan, and the plaintiffs then represented to this defendant that the said agreement was applicable to all merchandise to be purchased under said writing obligatory, which said letter was so sent and said representations were so made and caused to be made by the plaintiffs with the intent on their part thereby to induce this defendant to execute said writing obligatory, and this defendant, believing said representations to be true, and relying thereon, did set his seal," etc. That thereupon, Monaghan and McGuire purchased merchandise amounting to $14,477.16 and no more, of which sum $10,617.55 was for merchandise purchased at the prices aforesaid, and the remainder, $3,859.61 was for merchandise purchased at prices greatly exceeding the same, under another agreement made about December 11, 1903, without this defendant's knowledge or consent. That Monaghan and McGuire have received the sum of $9,100.48 on said first named amount leaving due under said bond the sum of $1,517.07 and no more.

The next additional plea (numbered 5) sets out the general agreement as before, but adds thereto that it was agreed that the merchandise sold should never exceed $10,000. That plaintiffs failed to perform that condition, or any other, and permitted the indebtedness of Monaghan and McGuire to exceed the said sum, whereby defendant has been discharged of his liability under said bond.

The last additional plea reads as follows:

6. And this defendant William McGuire, for a further plea to the said declaration, says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that on or about the date thereof, to wit, September 11, 1903, the defendants John F. Monaghan and J. Charles McGuire entered into a copartnership agreement between themselves to engage in the liquor business under the firm name of Monaghan and McGuire, and to deal in the goods of the plaintiffs, and during the year 1903 the said Monaghan and McGuire established said business and dealt in said goods with great profit to themselves and to the plaintiffs; that said writing obligatory was delivered to the plaintiffs for the purpose of establishing and maintaining the credit of said Monaghan and McGuire with the plaintiffs, and of maintaining said business. But on or about the 12th day of January, 1904, the plaintiffs, well knowing the premises, and with the intent to secure to themselves the customers and business which had been before that time obtained and established by said Monaghan and McGuire, and to sell directly to such customers, and thus increase the profits of the plaintiffs, wrongfully enticed and induced the said Monaghan to withdraw from said copartnership and to enter the employ of the plaintiffs, and as agent of the plaintiffs to sell their goods to said customers; and thereupon

the said Monaghan, yielding to said enticement and inducement, did withdraw from said copartnership and did enter the employ of the plaintiffs as and for the purposes aforesaid, and thereby the business of said copartnership was wholly destroyed, and said Monaghan and McGuire by reason thereof became and were unable to pay the plaintiffs for the merchandise referred to in said writing obligatory; all which the enticement and inducement by the plaintiffs and their employment of said Monaghan as aforesaid were without the consent or knowledge of this defendant, who was thereby wholly discharged of and from all liability under or by reason of said supposed writing obligatory.

Demurrers were sustained to each of the foregoing pleas, and defendants, J. Charles McGuire and William McGuire, electing to stand upon said pleas, judgment was entered against them for $5,000 on February 24, 1905. From this they have jointly appealed.

1. The court did not err in sustaining plaintiffs' demurrer
18 to the joint pleas of set-off filed by J. Charles McGuire and William McGuire, principal and surety, respectively.

The plea of set-off is in the nature of a cross action by the defendant, who, it is declared in the code, "shall be deemed to have brought an action at the time of filing such plea against the plaintiff for the matters mentioned in the plea." When such plea has been filed, the plaintiff may not discontinue his action without the defendant's consent, and, whether he undertakes to maintain his claim or not, "the defendant shall be entitled to a trial of, and judgment upon, his claim." Sec. 1565; Samaha *v.* Samaha, 18 App. D. C. 76.

It follows, necessarily, that the plea must state facts which not only bring it within the privilege of set-off, but would also constitute a good cause of action if the party pleading were the plaintiff in the prosecution of a suit therefor. And while the technical formality and accuracy of a declaration may not be required, the plea must, nevertheless, inform the plaintiff, with reasonable certainty, of the particulars of the demand which he is called upon to defend. Crawford *v.* Simonton, 7 Post. (Ala.) 110, 126; O'Brien *v.* Anniston Pipe Works, 93 Ala. 582, 584; Garrett *v.* Love, 89 N. C. 205, 207; Waterman on Set-off, secs. 646, 648; Ency. Pl. & Pr. 751, 752.

The two pleas fail under the application of this test. Without reference to the general vagueness of allegation, it is sufficient to say that they are notably defective in respect of the agreement claimed to have been made between the plaintiffs and Monaghan and McGuire for the sale of merchandise, and of the manner in which that agreement was violated to the injury of them and their sureties. If there was an agreement between the plaintiffs and the principals, of which the contract of the sureties formed a part, and the breach of which occasioned recoverable damage, it was incumbent upon them to set out the terms of the same and the acts of breach with reasonable certainty. What has been said applies also to the first and fourth separate pleas of set-off by William McGuire, the surety.

2. The errors assigned on the striking out of the second, third, and fifth separate special pleas of the surety, William McGuire, can be considered together, as they rest upon substantially the same

ground. As general defenses to the action against the surety, they substantially repeat the allegations of the pleas of set-off that have been considered. The fourth plea goes a little further in respect of the agreement made for the sale of merchandise than the others, by alleging that it was contained in a certain letter, which, however, is not set out, nor are its contents in respect of terms, prices, etc., alleged. The fifth plea omits the reference to the letter, but adds another item of the general agreement which it alleges the violation of, namely, that plaintiffs would never permit the indebtedness of Monaghan and McGuire to exceed $10,000.

It is questionable if these pleas were sufficiently certain and definite; but assuming that they do state an agreement between the plaintiffs and the principals in the bond, and a breach of that agreement by the plaintiffs, we are of opinion that the court did not err in sustaining the demurrer to each of them.

The sureties, Clark and William McGuire, had no connection with the business of Monaghan and McGuire. One feature of the negotiations, and the alleged agreement between them and plaintiffs, was that they should furnish the surety bond. Clark and William McGuire brought themselves solely under obligation by executing the bond. This recites that Monaghan and McGuire are desirous of purchasing merchandise from plaintiffs, "now and from time to time hereafter," which they "have bound and hereby bind themselves to pay for *in four months after the date of each respective purchase;*" and the condition is that if the said Monaghan and McGuire "shall strictly and faithfully pay or cause to be paid to" plaintiffs, "for merchandise now and hereafter purchased, the moneys due and to become due thereon *when and as the same shall become due and payable,* then this obligation shall be null and void; otherwise," etc. This bond neither incorporates nor refers to the alleged contemporaneous agreement between the principals and the obligees relating to the prices of the merchandise, or the gross amount of sales that might be made upon credit. Contemplating that the credits might exceed $5,000 the sureties expressly limited their liability to that amount. Having fixed this limit, the bond recites what may have been a special stipulation of a general agreement with the principals, and which was of apparent importance to the sureties, namely, that each separate sale of merchandise shall be upon a credit of four months. The bond is, therefore, upon its face, complete in itself, and has no relation to, or dependence upon, a general contemporaneous agreement with the principals relating to the business to be carried on between them and the obligees. It it not pretended that by the agreement the principals were bound to deal exclusively with the plaintiffs, and it is reasonable (in fact, a different arrangement would seem extraordinary) that in commencing a business to continue indefinitely future prices would be regulated by a varying market, and amounts of sales by the needs of a probably increasing volume of business. The bond does not provide for or against such contingencies, either expressly or by inference, but confines itself to a limitation of the amount of the surety's liability and the credits to be given on each sale. In the

absence of any agreement with the surety to the contrary, the law imposes no restriction upon arrangements between principals and obligees that may affect the terms and volume of their continuing business. Domestic S. M. Co. *v.* Webster, 47 Iowa, 357, 361; Amicable Life Ins. Co. *v.* Sedgwick, 110 Mass., 163, 166. Both of those cases were actions upon surety bonds, and are directly in point. See, also, Stuts *v.* Strayer, 60 Ohio St. 384, 387; U. S. Glass Co., *v.* Matthews, 61 U. S. App. 542, 547. The bond, not being by any of its terms dependent upon the agreement between the principals and obligees, the relation between them must depend for its establishment upon parol evidence. In the absence of any allegation that the agreement was to be incorporated in the bond, or referred to therein as creating a dependence of one upon the other, and
19 that it was omitted through mistake, accident, or fraud, such evidence is inadmissible. Domestic S. M. Co. *v.* Webster, 47 Iowa, 357, 361; Seitz *v.* Brewer's Refrigerating Co., 141 U. S. 510, 517; Purity Ice Co. *v.* Hawley Furnace Co., 22 App. D. C. 573, 591; Knight *v.* Walker Co., 23 *Idem* 519, 524; Newman *v.* Baker, 10 *Idem* 187, 194.

It is to be remembered, moreover, that the bond is not merely silent in respect of the alleged contemporaneous agreement, but expressly incorporates one of its stipulations, of obvious importance to the risk assumed by the sureties, namely, that fixing the credit periods.

It is hardly necessary to remark that there is no allegation in the pleas that the bond was not to take effect as an obligation, except upon the performance of a definite, *precedent* condition, as in Burke *v.* Dulany, 153 U. S. 228; and Donaldson *v.* Uhfelder, 21 App. D. C. 489.

3. The sixth special plea of the surety, William McGuire, heretofore recited, must be separately considered.

This plea is not technically one of set-off within the form prescribed by the Code (Sec. 1564), but rather of recoupment, although it has been argued in both aspects.

(1) Treating it as a plea of set-off and assuming that a valid claim for damages comes within the definition of "an indebtedness of the plaintiff to the principal," which the surety might set off under the provisions of section 1568, it is, nevertheless, substantially defective. If it were made the ground of an original action by the other partner, J. Charles McGuire, it would be subject to demurrer, because it does not appear that the partnership with Monaghan, who, it is alleged, terminated it under the malicious persuasion of the plaintiffs, was one for any specified term of duration. No action would lie against Monaghan for terminating a partnership at will. Karrick *v.* Hahneman, 168 U. S. 328, 335. The motives prompting him in so doing, therefore, are immaterial.

It has been held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer, Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 13; Leonard *v.* Abner-Drury Brew. Co., 25 App. D. C. 161, 175. If, however, the conditions were such that the aggrieved partner might

have a cause of action against the plaintiffs, it would not be maintainable by him or his surety by way of set-off under the Code. Section 1563 thereof provides that: "Mutual debts and claims, under contract between the parties to a common law action, or between any of the several defendants and the plaintiff, * * * may be set off against each other by plea in bar, whether said debts or claims be of the same or a different nature or degree, and whether the claims be for liquidated debts or unliquidated damages for breach of contract; and if either debt be in the form of a penalty of a bond the exact sum to be set-off shall be stated in the plea."

Liberal as this section is in permitting set off, it embraces matters of contract only; and while unliquidated damages for a breach of the contract relating to the sale or warranty of the goods could be set off in an action by the vendors for their value, no damages for a mere tort, as is the case in this plea, can be so pleaded. Matters of mere tort are clearly not within the statute.

Assuming, but without intending to intimate an opinion, that the surety has a right of action for malicious interference in the matter of the partnership contract of his principal, whether that principal has or has not a similar right, it necessarily falls within the same rule of exclusion.

(2) On the other hand, regarding the plea as one of recoupment at common law, independent of any statute, it is likewise bad. The rule which permits the introduction of evidence in defense of actions upon contracts, in mitigation, diminution, or extinction of damages, has been liberally expounded by the courts of common law generally, without the sanction of statutes, through the natural desire to avoid circuity and multiplicity of actions. But no one of these, so far as we are advised, has ever permitted defenses by way of recoupment that were not immediately connected with, or had not arisen out of the same contract or suit on which the plaintiff relied to maintain his action. See Van Buren *v.* Digges, 11 How. 460, 475; Winder *v.* Caldwell, 14 How. 434, 443 (both cases arising in the District of Columbia); Dushane *v.* Benedict, 120 U. S. 630, and cases therein reviewed; R. R. Co. *v.* Car Co., 5 App. D. C. 524, 529; Tyler *v.* Messenger Co., 17 App. D. C. 85, 90.

(3) We have not deemed it important to consider the objection that one of the sureties could not maintain a separate cross action for the damage done to both by the same wrongful act, because the cosurety has filed a similar plea, and the practical result is the same as if they had joined in one.

The judgment must be affirmed with costs, and it is so ordered.

Affirmed.

20 WEDNESDAY, *November 8th, A. D.* 1905.

No. 1550, October Term, 1905.

J. CHARLES MCGUIRE and WILLIAM MCGUIRE, Appellants,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

November 8, 1905.

WEDNESDAY, *November 22nd, A. D.* 1905.

No. 1550.

J. CHARLES MCGUIRE and WILLIAM MCGUIRE, Appellants,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

On motion of Mr. L. A. Bailey, attorney for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond to act as supersedeas is fixed at the sum of seventy-five hundred dollars.

21 FRIDAY, *November 24th, A. D.* 1905.

No. 1550.

J. CHARLES MCGUIRE and WILLIAM MCGUIRE, Appellants,
vs.
LOUIS GERSTLEY and WILLIAM GERSTLEY, Surviving Partners of the Firm Trading as Rosskam, Gerstley & Company.

On motion of Mr. L. A. Bailey, attorney for the appellants, leave is granted the appellant, J. Charles McGuire, to file a bond for costs on the writ of error in the above entitled cause in the sum of two hundred and fifty dollars, in lieu of supersedeas bond.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between J. Charles McGuire and William McGuire, Appellants, and Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, Appellees, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of December, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

23 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, J. Charles McGuire, as principal, and Michael P. Sullivan, Dennis W. Magrath, William McGuire, as sureties, are held and firmly bound unto Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company in the full and just sum of Two Hundred and fifty dollars ($250) to be paid to the said Louis Gerstley and William Gerstley, surviving partners as aforesaid, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty fourth day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between J. Charles McGuire and William McGuire, Appellants, and Louis Gerstley and William Gerstley, surviving partners as aforesaid a judgment was rendered

st the said J. Charles McGuire and William McGuire and the
J. Charles McGuire having obtained a writ of error and filed
y thereof in the Clerk's Office of the said Court to reverse the
nent in the aforesaid suit, and a citation directed to the said
Gerstley and William Gerstley, surviving partners as afore-
iting and admonishing them to be and appear at a Supreme
of the United States, to be holden at Washington, within thirty
from the date thereof:

w, the condition of the above obligation is such, That if the
J. Charles McGuire shall prosecute said writ of error to effect,
nswer all costs if he fail to make his plea good, then the above
ation to be void; else to remain in full force and virtue.

J. CHAS. McGUIRE. [SEAL.]
MICHAEL P. SULLIVAN. [SEAL.]
DENNIS W. MAGRATH. [SEAL.]
WILLIAM McGUIRE. [SEAL.]

led and delivered in the presence of—
WM. F. COLUMBUS.
WM. F. COLUMBUS.
WM. F. COLUMBUS.
WM. F. COLUMBUS.

proved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

ndorsed:] No. 1550. J. Charles McGuire *et al.*, Appellants, *vs.*
Gerstley *et al.* Bond for costs of J. Charles McGuire on Writ
rror to Supreme Court, U. S. Court of Appeals, District of
nbia. Filed Dec. 6, 1905. Henry W. Hodges, Clerk.

(*Bond on Writ of Error.*)

now all Men by these Presents, That we, William McGuire, as
ipal, and Michael P. Sullivan, Dennis W. Magrath, as sureties,
eld and firmly bound unto Louis Gerstley and William Gerst-
surviving partners of the firm trading as Rosskam, Gerstley &
pany in the full and just sum of Seventy five hundred dollars
00) to be paid to the said Louis Gerstley and William Gerstley,
ving partners as aforesaid, their certain attorney, executors,
nistrators, or assigns; to which payment, well and truly to be
, we bind ourselves, our heirs, executors, and administrators,
ly and severally, by these presents.

aled with our seals and dated this twenty third day of Novem-
n the year of our Lord one thousand nine hundred and five.

hereas, lately at a Court of Appeals of the District of Columbia,
suit depending in said Court, between J. Charles McGuire and
am McGuire, Appellants, and the said Louis Gerstley and
am Gerstley, surviving partners as aforesaid a judgment was
ered against the said J. Charles McGuire and William Mc-

Guire and the said William McGuire having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Gerstley and William McGuire, surviving partners as aforesaid citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said William McGuire shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM McGUIRE. [SEAL.]
MICHAEL P. SULLIVAN. [SEAL.]
DENNIS W. MAGRATH. [SEAL.]

Sealed and delivered in the presence of—
WM. F. COLUMBUS.
WM. F. COLUMBUS.
WM. F. COLUMBUS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1550. J. Charles McGuire *et al.*, Appellants, *vs.* Louis Gerstley *et al.* Supersedeas Bond of William McGuire on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Dec. 6, 1905. Henry W. Hodges, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein J. Charles McGuire and William McGuire are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of December, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service of the within citation is hereby acknowledged on behalf of the defendants in error, December 7, 1905.

MYER COHEN,
Of Att'ys for Def'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 7, 1905. Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 25, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of J. Charles McGuire and William McGuire, Appellants, *vs.* Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company. No. 1550. October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 9th day of December A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,019. District of Columbia Court of Appeals. Term No. 168. J. Charles McGuire and William McGuire, plaintiffs in error, *vs.* Louis Gerstley and William Gerstley, surviving partners of the firm trading as Rosskam, Gerstley & Company. Filed December 19th, 1905. File No. 20,019.

FILE COPY.

Office Supreme Court
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JAMES H. McKEN

(20,019.)

Supreme Court of the United States.

October Term, 1906.

No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE,
Plaintiffs in Error,

vs.

LOUIS GERSTLEY AND WILLIAM GERSTLEY,
Surviving Partners of the Firm trading as Rosskam, Gerstley & Company.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

LORENZO A. BAILEY,
For Plaintiffs in Error.

Byron S. Adams, Printer.

(20,019.)

Supreme Court of the United States.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was an action of debt, begun in the Supreme Court of the District of Columbia, upon a conditional bond, dated September 11, 1903, in the penal sum of $5,000, wherein the plaintiffs (now defendants in error) are named as obligees and wherein the obligors are John F. Monaghan and J. Charles McGuire as principals and John W. Clark and William McGuire as sureties (R., 2).

The said bond which was filed with the declaration recites that the said principal obligors desire to purchase merchandise from the plaintiffs "now and from time to time

hereafter," which the said principals "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase."

The condition is that the bond shall be void if the principal obligors shall pay "for merchandise now and hereafter so purchased the moneys due and to become due thereon when and as the same shall become due and payable."

The bond is therefore, by express terms, applicable only to goods purchased on four months' credit.

The declaration names all the obligors as defendants, states the substance of the obligatory clause of the bond, sets forth the condition (omitting the recital of the terms as to four months' credit), and then alleges the purchase thereafter by the principal obligors from the plaintiffs of merchandise amounting to $14,497.16, of which $9,100.48 have been paid, leaving overdue and unpaid $5,396.68, and claims damages in the sum of $5,000, with interest, etc.

The declaration does not set forth the terms recited in the bond or any terms of purchase, nor does it state when the charges for merchandise became due and payable, nor does it state that the merchandise charged for was sold on four months' credit or upon the terms stated in the bond.

The defendants, J. Charles McGuire, one of the principal obligors, and Wm. McGuire, a surety, filed two joint pleas of set-off, and the latter also filed six separate pleas.

To all said pleas the plaintiffs demurred. The court sustained the demurrers. The said defendants McGuire elected to stand upon their pleas, and thereupon judgment against them was granted to the plaintiffs for $5,000, with interest and costs (R., 13). Upon appeal by the said defendants McGuire to the Court of Appeals of the District of Columbia, the said judgment was affirmed (R., 23), and they now prosecute this writ of error.

The questions involved are as to the sufficiency of each plea and of the declaration itself. As the determination of

these questions requires an examination of each plea separately, reference is hereby made to the record for that purpose (R., 1-11); the general nature of each being indicated as follows:

The first joint plea (R., 5, 6) sets out fully an agreement made August 25, 1903 (ante-dating the bond), by and between the plaintiffs and the principal obligors (Monaghan & McGuire), and the full performance thereof by the latter, including, among other things, the giving of the bond in suit, the establishment, at an expense of not less than $10,000, of a profitable wholesale liquor business in the District of Columbia, with from seventy to eighty customers and the establishment and maintenance in said District of a demand for the liquors sold by the plaintiffs. It also alleges that at the time of said agreement it was understood by the parties thereto and as part thereof that the said principal obligors would enter upon said business without means or capital to sustain the same, other than the continuous credit the plaintiffs agreed to give them for $10,000, and that they should make sales on credit and "upon such terms as to time of payment and otherwise as the said Monaghan and McGuire should find and believe to be the best terms obtainable, having in view the establishment and maintenance in said District of a demand for the plaintiffs' goods, and that the said Monaghan and McGuire would not be required to pay for said goods so sold to their customers until they could make collections therefor from their said customers." It also alleges that from the date of the bond to December 10, 1903, the plaintiffs furnished goods amounting to about $10,000, which the principal obligors sold to their said customers, all in accordance with the agreement, and that thereafter the plaintiffs, wrongfully and with intent to destroy said business and sell goods directly to said customers (and before the four months mentioned in the bond had expired), and in violation of the agreement, drew on the prin-

cipal obligors for $1,500, and thereafter refused to furnish them with more goods except at prices greatly exceeding the prices specified in said agreement; whereby the plaintiffs wrongfully destroyed the credit and business of said Monaghan and McGuire and forced them to abandon their said business, etc.

The second joint plea (R., 6, 7) sets up a similar agreement, of a different date, and is generally similar to the preceding plea, but omits the agreement that the principal obligors would not be required to pay until they could make collections from their customers.

The first separate plea of the surety, Wm. McGuire (R., 7, 8) alleges that under an agreement between him and the plaintiffs, he became such surety in consideration of their agreement with him that they would sell goods to the principal obligors, Monaghan & McGuire, at and for certain prices specified in said agreement, and allow them a continuous credit therefor in the sum of $10,000; but that after he became such surety the plaintiffs wrongfully refused, upon request, to sell the goods at said prices, or to allow the said credit, whereby the principal obligors were prevented from paying for the goods, etc.

Each of the foregoing pleas is a plea of set-off, and the bond in suit is therein alleged to have been given in performance of certain prior agreements which do not appear to have been merged in the bond.

The second separate plea of the surety, Wm. McGuire (R., 8) alleges matter to discharge a surety, to wit, a certain other and independent agreement between the plaintiffs and the principal obligors for the sale of the merchandise referred to in the declaration and fixing the prices thereof and the terms of the sales; that afterward, in consideration of said agreement, he became surety in said bond; that thereafter the plaintiffs, without his consent or knowledge, entered into certain other agreements with said principal ob-

ligors, changing said terms and prices to his prejudice, and wrongfully refused to make the sales at said prices or upon said terms.

The third separate plea of the surety, Wm. McGuire (R., 8, 9) alleges that the merchandise referred to in the declaration was sold to the principal obligors under and according to the terms of certain agreements, not under seal, between them and the plaintiffs, entered into before and since the date of the bond, and not under or according to the terms of the bond, which specified a credit of four months, and that he was thereby discharged.

The fourth separate plea of the surety, Wm. McGuire (R., 10) which the Court of Appeals erroneously designated a plea of set-off (R., 19, bottom) and held bad, as such, for want of reasonable certainty, is neither in form nor in effect a plea of set-off. It alleges certain representations by the plaintiffs with the intent on their part thereby to induce him to become such surety. It was thus represented to him that under a certain agreement between the plaintiffs and the principal obligors, to which he was not a party, the plaintiffs were required to sell the merchandise in question for certain prices then specified in writing, but afterward, without his consent or knowledge, the plaintiffs entered into a new agreement with the principal obligors, increasing the prices; and as to the goods sold at such increased prices, the amount of which is specified in the plea, he claims to be thereby discharged.

The fifth separate plea of the surety Wm. McGuire (R., 10, 11) alleges that the bond was entered into by him and was delivered upon certain conditions to be performed by the plaintiffs, but never performed by them, and that he was thereby discharged.

The sixth separate plea of the surety Wm. McGuire (R., 11) alleges that the bond was delivered for the purpose of establishing and maintaining the business of the principal

obligors as co-partners, and enabling them to deal in the goods of the plaintiffs, but that the plaintiffs, with the intent to secure to themselves the said business and to increase their profits by selling directly to the customers of Monaghan and McGuire, wrongfully enticed one of said co-partners, Monaghan, to withdraw from the copartnership and to enter the employ of the plaintiffs, and as their agent to sell their goods to said customers, and thus wholly destroyed said business, whereby the principal obligors were unable to pay for the goods sold them, and that the said surety was thereby discharged.

SPECIFICATION OF ERRORS.

The Court of Appeals erred as follows:

1. In holding (Rec., 19) that the 1st and 2d joint pleas of the defendants, and also the 1st and 4th separate pleas of the defendant Wm. McGuire were bad for want of reasonable certainty.

2. In holding (Rec., 19, 21) that parol evidence to sustain the 2d, 3d and 5th separate pleas of the defendant Wm. McGuire was inadmissible, and also in assuming that the defendants had none but parol evidence to adduce to sustain said pleas.

3. In holding (Rec., 19, 20) that evidence in support of the 3d separate plea of the surety Wm. McGuire, and tending to prove that the merchandise was not purchased under or according to the terms of the bond, was inadmissible.

4. In holding (Rec., 21, 22) that the 6th separate plea of the defendant Wm. McGuire was either a plea of set-off or else of recoupment, and bad in substance.

5. In holding that each of the pleas demurred to was bad in substance, and in sustaining the demurrer thereto.

6. In refusing to hold that the declaration was defective

in substance and insufficient on demurrer to sustain a judgment.

7. In affirming the judgment of the Supreme Court of the District of Columbia.

BRIEF OF ARGUMENT.

1ST SPECIFICATION OF ERRORS.

1. The 1st and 2d joint pleas and the 1st separate plea of the surety (R., 5-8), are the only pleas of set-off in the case. The Court of Appeals held each of them insufficient to "inform the plaintiff, with reasonable certainty, of the particulars of the demand which he is called upon to defend" (R., 19).

The agreement mentioned in each of these pleas is pleaded according to its legal effect, which is proper and sufficient.

1 Chit. Pl., 334.

The breaches are set out with sufficient certainty.

The damages claimed are such as may be presumed to result from the breach. Such damages are matter of evidence, and need not be alleged and are scarcely ever stated but in a general manner.

2 Johns. Rep., 149, Barruso vs. Madan;
1 Chit. Pl., 371.

Profits of such a business may be considered in damages.

1 Sedgw. Dam., Sec. 182.

2. The plaintiffs deny (R., 9) the right of a surety to set off a debt due his principal in an action against the principal and surety, and also deny the right of one member of a partnership to set off a debt due the entire partnership.

In this District, before the Code, such right of a surety was recognized. (See U. S. vs. West, 8 App. D. C., 59.) The Code D. C., section 1568, provides that "in an action

against principal and sureties an indebtedness of the plaintiff to the principal may be set off as if he were the sole defendant."

But the broad terms of section 1563 of the Code fully justify the pleas of set-off. That section permits claims under contract, whether "of the same or a different nature," including, among others, claims for unliquidated damages for breach of contract "between *any* of the several defendants and the plaintiff," to be set off against each other by plea in bar.

Each claim of set-off may be considered as an action against the plaintiffs.

Code D. C., sec. 1565.

The agreements referred to in the first and second joint pleas were joint and several for the purposes of this suit, and it is immaterial whether the parties were "partners or merely joint contractors."

Code D. C., sec. 1205.

Statutes of set-off are to be liberally construed.

25 A. & E. Enc. (2d Ed.), 491.

A defendant may set-off his interest in a promissory note held by himself and another who is not a party to the suit.

22 Pa. St., 36, Smith & Co. vs. Myler & Aber.

5 Vt. 111 and other cases cited in 25 A. & E. Enc. (2d. Ed.), 523 and note 4.

3. The fourth separate plea of the surety McGuire (R., 10) was by the Court of Appeals (R., 19, bottom), designated and dealt with as a plea of set-off; but it is not such in form or in effect. It is a plea of discharge and rests upon the theory that if the representations, made to him by the plaintiffs, as to the fact and the effect of the former agree-

ment were true, the subsequent agreement so affected his liability as to discharge him.

1 Brandt, Sur. (3d Ed.), Secs. 255, 439.
77 Ga., 40, *infra*.
35 Vt., 476, *infra*.
2 Bland, Ch. R., 509.

On the other hand, if such representations were untrue, they operated as a fraud upon him and he would be thereby discharged.

77 Ga., 40, Marchman vs. Robertson.

2D AND 3D SPECIFICATIONS OF ERRORS.

1. The second separate plea of the surety McGuire (R., 8), sets up an agreement, preceding the bond, fixing the prices and terms; that this agreement was the consideration for giving the bond; that the prices and terms were changed by subsequent agreements made without his consent or knowledge. The consideration was thereby destroyed and the surety discharged. This may be established by parol evidence.

77 Ga., 40, Marchman vs. Robertson.
35 Vt., 476, Hickock vs. Farmers', etc., Bank.
17 Ind., 126, Campbell vs. Gates.
88 S. W., 430, Moroney vs. Coombes.
54 Iowa, 684, Dicken vs. Morgan.
1 Brandt, Sur., 454.
5 Cyc., 742-744, 818.

2. The third separate plea of the surety (R., 8, 9) denies that the goods were sold on the terms provided in the bond (as to four months' credit), and alleges that they were sold on other terms and under certain agreements, not under seal, to which he was not a party. As to such goods, not sold on four months' credit, and therefore not contem-

plated by the bond, the surety was never liable. They were not within his contract.

1 Starkie, 192, Bacon vs. Chesney.
10 N. Y., 469, Leeds vs. Dunn.
1 Brandt, Sur., 140, 467.

In reference to the 3d specification of errors, it is to be observed that the plaintiffs were required to adduce evidence outside the bond as to the sale of the goods, quantity, prices, etc.; also that they were required to prove that the goods were sold on four months' credit as provided expressly by the bond. Therefore, it is unreasonable to say that the defendants, and particularly a surety, can not adduce other evidence to rebut the plaintiffs' proofs and show that the goods, or some of them, were sold, not on four months' credit, but on other terms as to time of payment, and therefore not within the bond.

In McMinn vs. Owen, 2 Dall., 173, proof was admitted of a contemporaneous parol agreement that the instalment to be paid under the bond in suit should be paid in money current, when due.

The bond was by its terms intended to secure the plaintiffs to the amount of $5,000 for all goods sold by them to the principal obligors on four months' credit and for no other goods. The plea alleges that the goods in suit were not sold on the terms of the bond, but were sold under certain other agreements, etc.

Any dealings with the principal by the creditor which amount to a departure from the contract by which the surety is bound or which may affect his liability will discharge him.

1 Brandt, Sur., 439.

A creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's consent

which at all varies the situation, rights, or remedies of the surety.

1 Brandt, Sur., 439.
2 Bland Ch. R., 509.

It is immaterial whether or not the change be beneficial to the surety.

24 How., 315;
9 Wall., 13;

3. The fifth separate plea of the surety alleges delivery upon conditions therein set forth, which were "known to and accepted by the plaintiffs," but which have never been performed. This operated as a discharge.

1 Brandt, Sur., 454.
17 Ind., 126, Campbell vs. Gates.
35 Vt., 476, Hickock vs. Farmers', etc., Bank.

4. The Court of Appeals (R., 21) held that the bond, not being by any of its terms dependent upon the agreements mentioned in these pleas, the relation between them must depend for its establishment upon parol evidence and that such evidence was inadmissible.

There is nothing in the pleas to justify the finding, or an inference that the surety was without written evidence to sustain the pleas. But parol evidence is admissible to show matter discharging a surety.

88 S. W. (Tex.), 430, Maroney vs. Coombes.
17 Ind., 126; 54 Iowa, 684 and other cases, *supra*.

4TH SPECIFICATION OF ERRORS.

The Court of Appeals held (R., 19, 20) that the 6th separate plea of the surety (R., 11) was either a plea of set-off or else of recoupment, and as such, bad in substance; but it is not such in form or in effect. It is based upon the proposition that such misconduct on the part of the obligees

in a bond, wilfully and maliciously preventing the performance of the condition of the bond and tantamount to fraud, will discharge a surety.

3 Ohio, 261, Trustees vs. Miller.

77 Ga., 40, *supra.*

The statement by the court (R., 21) that this plea "has been argued in both aspects" (*i. e.*, set-off and recoupment) has no foundation in anything in the oral argument or brief on the part of counsel for the surety, who took the same position in that court as is taken in this brief in reference to said sixth plea.

5TH, 6TH AND 7TH SPECIFICATIONS OF ERRORS.

1. Upon demurrer, the court will go back to the first substantial defect appearing in the pleadings. In this case it is in the declaration itself. The plaintiffs filed a declaration, which does not set forth the terms of sale contemplated by the bond, and then they deny the right of the defendants to prove what the terms were. This position is untenable.

The declaration alleges the bond was conditioned for the payment of *all* merchandise to be sold by the plaintiffs to the principal obligors, but the bond is expressly so limited as to cover only merchandise sold on four months' credit, and to exclude all merchandise sold on a longer, shorter, or any other term of credit.

Suppose, at a trial upon these pleadings, evidence were offered tending to prove that some or all of the merchandise in suit had been sold by the plaintiffs to the principal obligors upon six months' credit, or one month's credit, or under some contract or agreement other than the bond; would it not be error to exclude such evidence?

2. The facts stated in each plea are admitted by the demurrer as true. To hold a surety bound upon such a state

of facts is contrary to elementary principles, to sound reason and to common honesty.

He does not seek to alter or modify, by parol proof, anything contained in the bond, but he does insist upon the right to establish by competent proof that for some, if not all, of the merchandise in suit he was never bound under the bond and also that by reason of the other matters alleged in his pleas he has been discharged from liability.

There was nothing in the bond requiring the principal obligors to pay in four months for *all* the goods they should purchase from the plaintiffs or preventing sales to them on other terms as to time of payment. The second and third separate pleas of the surety allege and the demurrer admits that the purchases were made on such other terms "and not under or according to" the terms of the bond, which recites an agreement to pay "in four months after the date of each respective purchase," and the condition is that the goods "so purchased" (meaning on four months' credit) shall be paid for "when and as" such payments "shall become due and payable."

In this connection, the case of Leeds vs. Dunn, 10 N. Y., 469, *supra*, is in point. One Woodcock, by letter, ordered goods of the plaintiffs, asking credit. Dr. Perrine in writing promised to pay the total amount if Woodcock failed to pay within six months after shipment. Dunn, in writing, declared himself equally responsible with Perrine. Plaintiffs shipped part of the goods on a credit of four months. In a suit against Dunn the court held that he was not "responsible for the payment of the goods to be sold Woodcock upon a credit of four and of six months, but for the goods to be sold all on a credit of six months."

In the case at bar one of the questions squarely presented is whether or not the bond covers goods which were not sold on four months' credit.

Lord Ellenborough held that "The claim as against a

surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guarantee have been strictly complied with. If I engage to guarantee, provided eighteen months credit be given, the party is not at liberty to give twelve only, and after the expiration of six more to call upon me."

Bacon vs. Chesney, 1 Starkie, 192.

In United States vs. Freel, 186 U. S. 309, 316, this court adopted the statement of Mr. Justice Story, in 9 Wheat., 680, "That the liability of a surety is not to be extended by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded upon this ground." To this, the court added, as an elementary proposition, that when the surety's "undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished."

The bond in suit is such an undertaking. The "existing contract" to which it relates is referred to in the recital that the principal obligors "have bound and hereby bind themselves" to pay for the goods in four months after the date of each respective purchase. Although this made it necessary for the plaintiffs to allege and prove that the merchandise was purchased on those terms, the declaration is wholly silent on that point.

3. The principles declared in some of the cases above cited in support of the 2d, 3d, 4th and 5th specifications of errors, and particularly in reference to the 2d, 3d and 6th separate pleas of the surety, are as follows:

The engagement of a surety may be founded upon a consideration variant from that which induced its execution by his principal. If such consideration be a condition subse-

quent, to be performed by the creditor, his failure to perform it would operate as a fraud upon the surety and on that ground release him from all liability. Such defense, of failure of consideration, may be established by parol evidence and is not in conflict with the legal effect of his contract.

17 Ind., 126, Campbell vs. Gates.

Breach of a contemporaneous verbal agreement which constituted part of the consideration of a promissory note secured by mortgage, may be shown in defense, as failure of consideration, in a suit to foreclose the mortgage.

54 Iowa, 684, Dicken vs. Morgan.

A surety signed a promissory note upon the payee's promising that as soon as the note became due he would immediately proceed against the principal. For more than a year after the note became due the payee failed to sue the principal or to notify the surety, and meantime the principal became insolvent. Surety discharged.

35 Vt., 476, Hickock vs. Farmers' etc. Bank.

In a suit to foreclose a mortgage to secure payment of a note made by one Cook, the defendant, Mrs. Marchman, set up in her answer that she was merely a surety for Cook; that she was induced to sign by false and fraudulent representations of the plaintiffs that they would furnish Cook with a certain fertilizer to sell in certain territory; that Cook had placed orders for 250 tons of the fertilizer but the plaintiffs had failed and refused to furnish Cook with the fertilizer which, if they had done, he would have been enabled to pay the note and save her harmless. *Held,* that this either increased her risk or showed fraud and, in either view, released her.

77 Ga., 40, Marchman vs. Robertson.

A lessee was required by the lease to make certain improvements. To secure performance of his covenants, he

gave bond with surety. The condition of the bond contained a proviso that if the lessee should complete the improvements within four years the surety should be bound for the rent of the first year only. In a suit on the bond the defendant, surety, proved that after the expiration of the lease, but within the four years, the lessee was dispossessed by the plaintiffs, the lessors. *Held,* that the surety was liable for the first year's rent only, and it was immaterial whether or not the improvements were completed before the lessee was dispossessed because (within the time to perform) the obligees prevented performance.

3 Ohio, 261, Trustees vs. Miller.

A surety on a note may show, as matter of discharge, that part of the consideration for a mortgage, given by the principal debtor to secure payment of the note, was a contemporaneous parol agreement between the creditor and the principal debtor, unknown to the surety, that payment of the note should be extended for one year and the surety discharged. There was nothing on the face of the mortgage disclosing such an agreement. In such case it is not necessary to allege fraud, accident or mistake in order to render such evidence admissible.

88 S. W., 430, Moroney vs. Coombes.

A surety may show by parol evidence the consideration upon which he signed the bond and the failure of such consideration. Such failure will discharge the surety.

1 Brandt, Sur., Sec. 454.

4. Upon the whole record, it is respectfully submitted that the judgment should be reversed.

LORENZO A. BAILEY,
Counsel for Plaintiffs in Error.

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(20,019.)

Supreme Court of the United States.

October Term, 1906.

No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE,
Plaintiffs in Error,

vs.

LOUIS GERSTLEY AND WILLIAM GERSTLEY,
Surviving Partners of the Firm trading as Rosskam, Gerstley & Company.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

LORENZO A. BAILEY,
For Plaintiffs in Error.

Beresford, Printer.
City of Washington.

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REPLY BRIEF FOR PLAINTIFFS IN ERROR.

I.

In the brief for defendants in error, p. 1, the condition of the bond is stated according to their interpretation thereof and not according to its terms, meaning or legal effect; their contention being that "the bond is silent as to terms upon which the merchandise was to be bought" (p. 13), and that the bond covered *all* merchandise sold by the plaintiffs to the principal obligors "on *any* credit, or no credit at all" (p. 6).

This contention is wholly unfounded. The bond recites the desire of the principals to purchase from the obligees merchandise which the principals "have bound and hereby bind themselves to pay for in four months after the date of each respective purchase." The words "have bound"

must be understood to refer to some subsisting agreement for purchases on four months' credit. The condition is to pay for merchandise "so purchased"; meaning merchandise for which the principals at and before the date of the bond bound themselves to pay for in four months after the purchase thereof.

If the parties had intended the bond to have the meaning and effect contended for by defendants in error (p. 6), the term of credit would have been omitted from the recital and inserted in the condition in lieu of the words "when and as the same shall become due and payable" (R., 3).

The sureties had no reason to contemplate liability under this bond for goods "sold on *any* credit or no credit at all." The bond is not "silent as to terms." It relates only to goods sold on a credit of four months, and sales on any other terms would be outside the contract.

That the goods in suit were sold on other terms, is one of the principal grounds of defense, and particularly in the 3d and 2d separate pleas of the surety (R., 8, 9).

See also original brief for plffs. in error, pp. 13, 14, 9, 10.

II. THE PLEAS OF SET-OFF: DAMAGES.

(*a*) At p. 6 of their brief, defendants in error contend that damages for value of the business, lost profits and injury to credit are too conjectural and remote. The authorities cited by them do not sustain the contention. 53 Miss., 303, 306, and 52 Ark., 246, expressly admit that the defendant's claim would be well founded if it appeared "that he was without means, or other property to furnish a basis of credit, to purchase" the goods contracted for; and that is precisely what does appear in the first joint plea (R., 5).

Sedgwick on Damages, 8th Ed., is cited freely by defendants in error. Sec. 146 is an explanation of the rule in Hadley *v.* Baxendale, and states that plaintiff may recover if he can show "certain special facts to have been known to the

defendant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss," and calls attention to the fact that in Hadley *v.* Baxendale, " the Court added, that if the special circumstances had been known at the time of the contract of bailment, the damages claimed might have been recovered."

In the case at bar the "special circumstances" were well known to the obligees in the bond at the date thereof. They knew that the principal obligors were forming a copartnership for the purpose of establishing a demand for the goods of the obligees and to carry on the sale of such goods in the District of Columbia, and would have to rely wholly upon the continuous credit; being without other means or capital to sustain the business of the copartnership (R., 5).

Sedgwick, after a discussion of the rules as to proximate and remote loss, states (Sec. 122): "For the purpose of making this subject clearer; all losses, as has been seen, are either direct or consequential; and, further, consequential losses are either proximate or remote. A direct loss must always be compensated; a remote loss, never. Between the two lies the debatable ground of proximate loss. Proximate losses are either natural or unexpected. Of these, natural losses must always be compensated; unexpected losses cannot. But the line between the two latter classes of loss is a varying one; it depends, as will be seen, not only upon the nature of the wrongful act, but also upon the expectations which the wrongdoer, as a reasonable man, could have formed as to its result. Notice to the wrongdoer of a probable consequence may render that consequence a natural one, though it might otherwise have been unexpected. Compensation may be recovered for such proximate losses as are also the natural results of the wrongful act, either in the nature of things, or in the light of special circumstances of which the wrongdoer had notice."

"The effect of notice under the rule in Hadley *v.* Baxendale, is to enlarge the boundaries of natural consequences," and "A defendant has notice of what will occur in the ordinary course of business" (Sedgwick, Sec. 157). And, though notice must form the basis of the contract, yet it need not be a part of the contract. Proof of such notice is not received to vary the contract but is merely an attendant circumstance, "which, like any other matter in evidence, affects the consequences of the breach and the measure of recovery" (*Id.*, Secs. 159, 160).

Sedgwick, at Sec. 160, cites the case, 4 Q. B. Div., 670, where plaintiff recovered expenses incurred and profits of which he was deprived by defendants' breach, upon the ground of notice to the defendant, at the time of making the contract, of the special circumstances by reason of which the defendant might have foreseen the injury caused by his breach.

"Where the cause of action is a direct blow to the credit or trade of the plaintiff," loss of credit or custom is not too remote; as where defendant, agent of plaintiff in G., broke his contract to keep a cash account of £500 to meet plaintiff's drafts, and in consequence a draft was returned dishonored. Defendant was held liable for the loss of trade in G. which was consequently suspended and for loss in the general business of the plaintiff because of his impaired credit.

Sedgwick, Sec. 127.

"The plaintiff, then, may in all proper cases show a gain prevented as a ground for compensation." "If a plaintiff is not allowed to recover compensation for a gain prevented, it must be either because the failure to realize the gain is too remote and unlooked for a consequence of the injury, or because it is uncertain whether the gain would have been realized; and not because the gain was in the nature of an expected profit."

Id., Sec. 176.

The plea alleges that the principal obligors "entered upon and fully established" the business; that they "did establish and thereafter conduct" the business; that in the business their profits were very great, and that they lost all their time, money and labor expended, etc. (R., 5–7). Profits in such case may be considered in damages.

Id., Sec. 182.

The case, 42 Minn., 420, 422, cited by defendants in error, recognizes the rule stated by Sedgwick as to notice.

(b) There is nothing in the agreement for continuous credit to prevent performance within one year from the making of the agreement. The breach complained of occurred within four months.

(c) Waterman on Set-off, Sec. 648, says, "A plea of set-off need not, however, be as certain and formal as a declaration." Reasonable certainty, so as not to take the defendant by surprise, is sufficient.

The code, D. C., Sec. 1563, provides that set-off shall be by plea in bar; and Sec. 1565 does not make set-off an action, but merely puts a defendant in such a position that the plaintiff cannot evade the plea of set-off by dismissal of the suit.

The authorities cited by defendants in error, at pages 10 and 11 of their brief, are inapplicable. They refer to statutes not in the terms of the code D. C., Sec. 1563, which allows set-off of claims "between any of the several defendants and the plaintiff." These words last above quoted were inserted in the code by amendment, June 30, 1902.

III.

Counsel for plaintiffs in error, in reference to the propositions at p. 11 of the brief for defendants in error, concurs in the statement that "The absurdity of these propositions is manifest in their statement." The absurdity arises from

the attempt to misrepresent the nature and effect of the plea in question, which speaks for itself.

IV. SIXTH SEPARATE PLEA.

The case, 11 How., 461, cited by defendants in error at p. 13, and their proposition based upon that authority, are inapplicable. Sec. 1563 of the code, D. C., provides for set-off of "mutual debts and claims under contract," * * "whether said debts or claims be of the same or a different nature or degree." Under this statute a plaintiff may sue under one contract and the defendant may set off his claim under another contract.

The case, 168 U. S., 328, cited by them at p. 12, does not go as far as they say. Further, the partnership should not be considered as one at will.

The grounds of the plea are stated in our original brief, pp. 11, 12. It does not claim damages, but alleges as matters of discharge wrongdoing by the obligees which was actionable.

The Court will presume that the "wholesale liquor" business of Monaghan and McGuire, which they established in September, 1903, and maintained until January 12, 1904, was so established and maintained by them in accordance with the law which required them to obtain a license. The license so held by them in January, 1904, would not expire until November 1, 1904.

Act Cong. Mch. 3, 1893, Sec. 17, 27 S. L., 567.

The application for such license implied an agreement and imposed a duty to continue the partnership until the latter date, *i. e.*, during the term of the license, unless both partners consented to an earlier dissolution.

17 A. & E. Enc. (1st Ed.), 1096, and note 3;

1 R. I., 430, 443, Potter *v.* Moses.

Even in a partnership at will, a dissolution by the act of one partner must be done in good faith and seasonably.

Pothier, cited 3 Kent Com., 53, note d;
22 A. & E. Enc. (2d Ed.), 205.

An action at law will lie for a premature dissolution in violation of the partnership. In such a suit the claim will be for the wrong done the plaintiff personally as distinguished from a breach of duty owing to the firm.

17 A. & E. Enc. (1st Ed.), 1264, 1265.

And if there be collusion between a third person and a partner to injure the firm, they or either of them may be sued at law by the injured partner.

17 A. & E. Enc. (1st Ed.), 1266, 1267;
Moo. & M., 223, Longman *v.* Pole (22 Eng. C. L. R., 513);
103 N. Y., 235, 240, Sweet *v.* Morrison.

Such collusion and injury are shown by the 6th separate plea of the surety.

In Bowen *v.* Hall, 6 Q. B. Div., 339, the broad principle is laid down that a man who induces one of the parties to a contract to break it, intending thereby to injure the other party, is liable in an action. This principle is amply supported by American cases and is not confined to contracts for service.

107 Mass., 555, 565; 76 N. C., 355; 66 N. Y., 82;
2 Wend., 385; Lawson on Contracts, Sec. 115.

The fact, in such a case, that the contract is not binding under the Statute of Frauds, is immaterial.

66 N. Y., 82, 84, Rice *v.* Manley;
2 Wend., 385, Benton *v.* Pratt.

V.

The case in 47 Iowa, 357, cited by defendants in error, p. 15, is inapplicable to a case like the one at bar, in which

the bond was given to secure payment for goods to be sold on four months' credit, as set forth in the bond, and the surety alleges that the goods sold were not sold on those terms.

VI.

Our original brief is relied upon to meet all other points raised in the brief for defendants in error.

LORENZO A. BAILEY,
For Plaintiffs in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U.
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JAMES H. McKENNE
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No. 168.

J. CHARLES McGUIRE AND WILLIAM McGUIRE,
PLAINTIFFS IN ERROR,
vs.
LOUIS GERSTLEY AND WILLIAM GERSTLEY, SURVIVING PARTNERS OF THE FIRM TRADING AS ROSSKAM, GERSTLEY & COMPANY.

BRIEF FOR DEFENDANTS IN ERROR.

SIMON WOLF,
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LOUIS GERSTLEY AND WILLIAM GERSTLEY, SURVIVING PARTNERS OF THE FIRM TRADING AS ROSSKAM, GERSTLEY & COMPANY.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

This action was commenced in the Supreme Court of the District of Columbia, by Rosskam, Gerstley & Company, a copartnership, against John F. Monaghan and J. Charles McGuire, as principals, and John W. Clark and William McGuire, as sureties, to recover on a bond, dated September 11, 1903, conditioned for the payment within four months after the date of each respective purchase, for all merchandise purchased from the plaintiffs by the principals. The declaration alleges the purchase by the principals (Monaghan and McGuire) between the dates of September 24, 1903, and July 27, 1904, of merchandise aggregating $14,497.16, upon which credits aggregating $9,100.48 were made, leaving a balance of $5,396.68 overdue and unpaid. The last purchase made was July 27,

1904, and the suit was filed December 10, 1904, more than four months thereafter.

The defense is in the form of eight pleas, the first two being joint pleas of J. Charles McGuire, one of the principals, and William McGuire, one of the sureties, and the other six being separate pleas of said William McGuire. The two joint pleas and the first separate plea are pleas of set-off; the others are, in effect, pleas in confession and avoidance.

By the first and second pleas, the defendants allege that the plaintiffs are indebted to them in the sum of $10,000.00 damages sustained by the breach of an agreement, the obligatory part of which is that on August, 25, 1903, **the plaintiffs agreed with Monaghan and McGuire, the principals, that plaintiffs would sell said firm, whenever requested, "and for certain prices then specified and agreed upon"** the merchandise required in said business and **would allow said firm a continuous credit of $10,000.00.**

The following is assigned as a breach of this contract:

That the plaintiffs on December 10, 1903, wrongfully and with intent to destroy the business of said firm, drew on them for $1,500.00 of their account and on December 11, 1903, wrongfully refused to furnish merchandise to said firm at the prices aforesaid. And on January 13, 1904, refused to furnish any more goods under said agreement and forced said firm to abandon their business, which they had established at an expense of $10,000.00 and in which their profits were very great, whereby the plaintiffs destroyed their credit and business to their damage in the sum of $10,000.00.

By the third plea (numbered one, Rec., p. 7) the defendant, William McGuire, one of the sureties, claims $5,000 damages because he says that the performance

by the plaintiffs of the agreement set up in the first and second pleas was the consideration for which he became surety, and that by reason of their failure to perform, Monaghan and McGuire, the principals, were prevented from paying for the merchandise, whereby he has incurred great liability, and has been damaged to the extent of $5,000.

By the fourth and fifth pleas (numbered two and three, Rec., pp. 8 and 9) the defendant, William McGuire, says he ought not to be charged, because, on September 11, 1903, before the making of the bond sued on, **plaintiffs agreed to sell Monaghan and McGuire merchandise "at certain prices and terms;" that on December 11, 1903, and March 23, 1904, plaintiffs entered into other agreements with Monaghan and McGuire without the knowledge or consent of defendant, by each of which the terms and prices were changed to defendants' prejudice.**

By the sixth plea (numbered four, Rec., p. 10) the defendant says he is discharged as to all except $1,517.07, **because $3,859.61 worth of the merchandise sold, was sold at prices in excess of those which the plaintiff had agreed by letter of August 25, 1903, should be charged for the merchandise, and that of the balance $10,617.55** was sold upon terms mentioned in the letter; $9,100.48 has been paid, leaving $1,517.07 due.

By the seventh plea (numbered five, Rec., p. 10) defendant says that the **bond was delivered to the plaintiffs on certain conditions to be performed by the plaintiffs and which were violated, wherefore he is discharged.**

By the eighth plea (numbered six, Rec., p. 11), defendant says that the bond was delivered to the plaintiff for the purpose of establishing and maintaining the credit of

Monaghan and McGuire with the plaintiffs; **that plaintiffs enticed and induced Monaghan to withdraw from the firm and enter their employ, whereby the business of Monaghan and McGuire was destroyed and they were unable to pay for the merchandise and defendant was discharged.**

A demurrer to all of the pleas was sustained and was followed by a judgment which was affirmed by the Court of Appeals.

ARGUMENT.

The only questions raised by the assignment of errors are: The sufficiency of the declaration, and the sufficiency of each of the pleas as a defense thereto. In the District of Columbia, whence this case arose, Code pleading, as practiced in many of the States, is unknown, the courts administer the law according to the common law rules of pleading, save where those rules have been modified, in a few instances, by statute or rule of court. The elementary rules found in Chitty, Saunders, and Tidd, are still followed here, and applied with somewhat more strictness than they generally are in those jurisdictions where the entire pleadings consist of a complaint and an answer. It is still necessary that every pleading shall tend to the production of an issue that shall be material, single, certain, and unambiguous. Testing the pleas in this record by these rules, it will appear that they fall short of each and every requirement of good pleading; they are obscure in part, insensible in part, repugnant in part, entirely uncertain and prolix, and tender facts that would produce an immaterial issue if traversed. Some of these objections to the pleas being matters of form and assailable by motion to strike out (the modern substitute for the special demurrer at common law), would not be adverted to were they alone the vices of the pleas,

but it is necessary, in studying these pleas, to regard carefully the form, in order to ascertain the elusive substance. This characterization will be found not too severe, as will be shown in their analysis hereafter.

The Declaration.

The declaration alleges the execution and delivery of the bond in suit, profert of which is made, whereby the obligors bound themselves to the plaintiffs in the sum of $5,000.00, conditioned to be void if the principals named thereon should pay or cause to be paid, the moneys due and to become due the plaintiffs for merchandise, then and thereafter purchased, when and as the same should become due and payable; the time payable is stated by way of recital in the bond to be "in four months after the date of each respective purchase." The declaration alleges that on the days set forth in the particulars of demand, which are made a part of the declaration—that is to say, from September 24, 1903 to July 27, 1904—the principal obligors purchased from the plaintiff, merchandise aggregating $14,497.16, upon which payments aggregating $9,100.48 had been made, leaving a balance of $5,396.68; the last purchase was made July 27, 1904, and the action was commenced December 10, 1904, more than four months thereafter. Nonpayment of this balance is assigned as a breach of the condition of the bond.

This not only states a cause of action, but states it with all the technical accuracy of Chitty.

Chitty's Pleading, Vol. I, p. 363, Vol. II, p. 437.

It will be argued by counsel on the other side that the declaration is defective because it fails to state that the merchandise was sold by plaintiffs to the principals on a four months' credit. If the bond provided that the merchandise was to be sold on such a credit, the objection

would be hypercritical, but it does not in terms so provide; it simply binds the principals primarily and the sureties secondarily, to pay for all merchandise sold by the plaintiffs to the principals (on *any* credit, or no credit at all, we say) in four months after the date of each purchase. The contract is not to pay for all goods sold on a four months' credit, but to pay at the end of four months, for all goods purchased of plaintiffs by the principals. It fixes the time when liability commences, not the terms upon which the goods were to be sold. Aside from this, however, whether the goods were sold in terms on a four months' credit, or not, the principals actually received, as appears from the particulars of demand, four months' time on the balance in dispute.

THE PLEAS.

The First and Second Pleas of J. Charles and William McGuire, and First Separate Plea of William McGuire.

(*a*) The defense made in these pleas is, in form, set off, and is evidently predicated upon the theory that for a breach of contract to furnish merchandise indefinitely on credit, the injured party can recover the value of his business, the profits he might have made therein, and damages for injury to credit reputation. It has been repeatedly held that such damages are too conjectural and remote to be remediable. In the case of Levy vs. Sayle, 52 Ark., p. 246, suit was brought on a promissory note held by Sayle and Company against Levy, the answer admitted the execution of the note, but said the indebtedness was contracted under an agreement with plaintiffs whereby they agreed to furnish him, during the year 1885, goods and merchandise to the amount of $1,250, to assist him in carrying on his business; that, after plaintiff had furnished goods to the amount of

$242.03, they demanded his note at 90 days, which he gave, and which was the note in suit; that, afterwards, plaintiffs demanded another note, and, upon defendant's refusing to give it, they refused to furnish him any more goods and circulated the report that he had defaulted in his commercial paper, thereby injuring him in his credit; that defendant had made contracts to supply various planters, based on the contract with plaintiffs, and had suffered damage thereby.

The court, in affirming a judgment sustaining a demurrer to the answer, adopted the language of Judge Campbell in a similar case (Coleman *vs.* Galbreath, 53 Miss., 303) as follows:

> "He may recover any loss directly traceable to the breach of contract by the other party and fairly within the contemplation of the parties, as a result from such breach of contract, and which could not, by reasonable effort, have been avoided by the parties disappointed."

And goes on to say:

> "The question here is, do the allegations of the defendant's answer bring him within the rule? The contract itself furnishes no guide for the measure of damages, and the recoupment by the defendant could be only nominal and inappreciable in the absence of allegations of actual, substantial loss arising from the violation of the contract."

This case, just cited, is simply an application of the principle that **the damages recoverable under a contract must be the natural and proximate result of the breach of the contract or such as are in contemplation of the parties at the time the contract is made.**

Sedgwick Damages 8th Ed. Sec., 146.

The withdrawal of credit by one merchant does not necessarily or naturally result in commercial disaster to the merchant from whom it is withdrawn ; the failure might be attributable to a multitude of cooperating causes. It would be a result too remote to be regarded as the normal consequence of the withdrawal of credit.

Sedgwick Dam., Section 123 :

Loss of custom, credit, and business are too conjectural and remote to be considered as proper elements of damage.

Sedgwick, sections 127 and 175:

> "When the law does not imply that the plaintiff sustained damage by the act complained of, the resulting damage should be shown with particularity. And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then in order to prevent the surprise on the defendant, which might otherwise ensue on the trial, the plaintiff must in general state the particular damage he has sustained, or he will not be permitted to give evidence of it."

Sedgwick Section 1261:

The measure of damages for breach of a contract to deliver merchandise is the difference between the contract price and the price paid on open market.

> Lilgengren Furn. Co. *vs.* Meade, 42 Minn., 420.
> Hitchcock *vs.* Turnbull, 44 Minn., 475.

(*b*) The agreement is not alleged to have been in writing and as a pleading is taken most strongly against the pleader, it must be assumed that it was verbal. **An agreement to furnish a continuous credit is an agreement not to be performed within a year and must be in writing.**

Section 1117, Code D. C., provides as follows:

> "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(*c*) The prices and terms upon which the merchandise was to have been sold, are not set forth and the pleas are vague and indefinite in all their allegations. **A plea of set-off must disclose a state of facts such as would entitle the party pleading to an action if he were suing as plaintiff, and must contain the substance, at least, of a declaration.**

Crawford *vs.* Simonton, 7 Port. Ala., 110.
Waterman, Set-off Sections, 646, 648.
Garrett *vs.* Love, 89 N. C, 205.
Encyc. Pl. and Pr., vol. 19, p. 754.

A plea of set-off, containing facts which would entitle the defendant to nominal damages only, is insufficient; it will not even affect the matter of costs.

Hitchcock *vs.* Trumbull, 44 Minn., 475.

The first and second pleas of the defendants, J. Charles McGuire and William McGuire, commence by alleging

that the plaintiffs were, and still are, indebted to the defendants, John F. Monaghan and J. Charles McGuire, for that, etc.; they then set up a contract with Monaghan and McGuire jointly made for their joint benefit; they then allege a breach, and conclude as follows: Whereby, etc., "*the said Monaghan and McGuire were, and each of them was, thereby injured and damaged in the sum of ten thousand dollars ($10,000), for which sum the said J. Charles McGuire claims judgment, etc.*" By this plea J. Charles McGuire, one of the joint promisees under the alleged contract, which is indivisible, is asking for a several judgment in his favor alone on a cause of action, the title to which is in Monaghan and himself. **Where a promise is made to two or more jointly all the promisees must join as plaintiffs in an action for the breach thereof.**

Amer. & Eng. Encyc. Pl. & Pr., vol. 15, 528.

Set-off is an action.

Code D. C., sec. 1565.

The demand set off must be due to the defendant only.

Amer. & Eng. Encyc., 2d ed., vol. 25, 520.
Waterman on Set-off, section —.

These principles are not affected by the provisions of section 1568, Code D. C., which are only declaratory of the general law, allowing a surety to set off any claim which the principal himself might set off; the surety may not set off a claim in favor of one of two principals for whom he is surety any more than the principal himself may. A judgment in favor of J. Charles McGuire against Rosskam, Gerstley & Company for the excess claimed by him would be no bar to an action by Monaghan and McGuire on the same cause of action.

The third plea of set-off, which is the first separate plea of William McGuire, the surety, is plainly vicious, in that it attempts to set off a demand in his favor alone in an action against himself and three others.

A cause of action in favor of a surety alone can not be set off in a suit against principal and surety.

Corbett *vs.* Hughes, 75 Iowa, 281.
Am. & Eng. Encyc., 2d ed., vol. 25, 540.

There is a further objection to the first separate plea. In this plea, William McGuire, one of the sureties, says that he has suffered damages to the extent of $5,000 because, by reason of the breach of a contract, between plaintiffs and the principals, the principals were unable to pay the debt secured by their bond, and therefore he, the surety, became liable for it, and being liable for the sum of $5,000.00, he is damaged $5,000.00. If this be the theory of the plea, the legal principle should be stated thus: The surety becomes discharged the moment his liability accrues. A bond given to indemnify a merchant against the insolvency of his customer becomes worthless the moment his customer becomes insolvent. Instead of the surety indemnifying the obligee against the insolvency of the principal, the obligee, if he would hold the surety, must maintain the solvency of the principal. Or, to state the rule with more analogy to the theory of this plea, if an obligee in a bond enter into a contract with the principal in the bond and break that contract, the natural and probable consequence of that breach will be to cause damage to the surety. The absurdity of these propositions is manifest in their statement.

Second, Third, and Fourth Separate Pleas of William McGuire.

(Record, pp. 8, 9, and 10.)

These pleas are open to the same objections as those treated above and are further objectionable in that they purport to state the legal effect of one agreement upon another, without stating the terms of either. The failure to set out with certainty the terms and conditions of the agreements referred to in the pleas, makes it impossible for the court to determine whether or not there was any change in the contract of such a nature as to operate as a discharge of the surety. **The allegation of the pleader as to the effect of a contract which is not set forth in the pleading is the allegation of a conclusion of law.**

Encyc. Pl. & Pr., 12, 1038.

Fifth Separate Plea of William McGuire.

(Record, p. 10.)

The violation of a collateral agreement, such as that set up in this plea, does not operate as a discharge of surety. **A bond can not be delivered to the obligee, in escrow, or upon a condition not expressed in the instrument itself.**

Newman *vs.* Baker, 10 App. D. C., 187.

Sixth Separate Plea of William McGuire.

(Record, p. 11.)

This plea has been treated by counsel and the court below as a plea of set-off, and as a plea of recoupment; it is in form, neither, and is insufficient in substance to meet the requirements of either.

No action lies for terminating a partnership at will.

Karrick *vs.* Hannaman, 168 U. S., 328.

A defense by way of recoupment must arise out of the same contract or suit on which the plaintiff relies to make his case.

Van Buren *vs.* Diggs, 11 How., 461.

A tort is not the subject of set-off under our statute.

> "Mutual debts and claims under contract between the parties to a common law action, or between any of the several defendants and the plaintiff, or between one party and the testator or intestate of the other, or between the testators or intestates of both parties, may be set off against each other by plea in bar, whether said debts or claims be of the same of a different nature or degree, and whether the claims be for liquidated debts or unliquidated damages for breach of contract; and if either debt be in the form of the penalty of a bond the exact sum to be set off shall be stated in the plea."
>
> Section 1563, Code D. C.

All of the Pleas Considered Together.

There is a vital objection to all of the pleas that has not been touched upon in considering them separately. To admit evidence in support of these pleas would be to vary by parol the terms of the bond sued on. It must be remembered that the condition of the bond is to pay for merchandise to be purchased by Monaghan and McGuire to the extent of $5,000.00 and its plain purpose was to secure the payment of any balance for merchandise bought by them of Rosskam, Gerstley & Company, irrespective of the terms or conditions upon which the merchandise was obtained or the prices paid or contracted to be paid for it. **The bond is silent as to terms upon which the merchandise was to be bought.** This was a matter very properly left to the

contracting parties to determine. If evidence were admitted to show that the merchandise was to be purchased at certain prices, we would be interpolating into an instrument which is plain, complete, and unambiguous on its face, a new condition limiting materially the liability of the parties to it.

"When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object or extent of the engagement, it is (in the absence of fraud, accident or mistake) conclusively to be presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. Whether the written contract in this case fully expressed the terms of the agreement between the parties was a question for the court; and silence on a point that might have been embodied in it does not open the door to parol evidence in that regard."

Seitz *vs.* Brewers' Refrigerating Co., 141 U. S., p. 510.

It is true that any material alteration in or deviation from the terms of the contract for whose performance the surety is bound, will, if made without the consent of the surety, release him from his obligation; but here the terms of the contract, for whose performance the surety is bound, are set out in the bond, and that contract, as appears by the bond, is to pay for merchandise, not to pay a fixed or definite price for them. Had the condition of the bond been to pay for any balance that might become due for whiskey sold to Monaghan and McGuire at seventy-five dollars ($75) per barrel, and no whiskey was sold to them at that price but at a higher or lower price, the rule of *strictissimi juris* as applied to the liability of a surety would doubtless be a defense, but

there is no room for such a contention here, as no prices are fixed by the bond. Moreover, the contract referred to in the pleas are independent from the contract evinced by the bond sued on.

An alteration or modification of an independent or subsidiary agreement can not affect the surety's liability.

Domestic Sewing Machine Co. *vs.* Webster, 47 Iowa, 357.

Amicable Mut. Ins. Co. *vs.* Sedgewick, 110 Mass., 163.

Stutz *vs.* Stranger, 60 Ohio St., 384.

U. S. Glass Co. *vs.* Matthews, 61 U. S. App., 542.

The obligation created by the bond in suit is not to guarantee the performance of some agreement that may or may not have existed between the principals and the obligees, but to indemnify the obligors to the extent of $5,000.00 for any loss they might sustain by selling merchandise to the principal debtors; there is nothing in the bond about prices and it is immaterial to the sureties under the liability assumed what prices were charged for the merchandise.

In the case of Domestic Sewing Machine Co. *vs.* Webster et al., 47 Iowa, 357, the action was on a bond conditioned for the payment of every indebtedness which then or thereafter might exist on the part of Webster to the Domestic Sewing Machine Company; the surety pleaded that at the time of executing the bond an agreement was entered into between the Domestic Sewing Machine Company and Webster whereby Webster was appointed general agent of the company, upon certain terms as to compensation, shipment of goods, credit, etc.; that after the bond was executed, the company and Webster entered into another agreement,

materially changing the first agreement. In affirming a judgment on demurrer to this plea, the court said:

> "It is alleged that defendant executed the bond to secure the performance of the agreement and for no other purpose. It is very apparent that the obligation which defendant alleged he assumed is quite different from the one which upon the face of the bond he appears to have assumed. . . . It is quite true that a written agreement may be embraced in several separate papers, and, when it becomes apparent that such is the case, all must be construed together, in order to discover the intention of the parties. But the bond and the agreement referred to have no necessary relation to or dependence upon each other. It is quite reasonable that plaintiff should have entered into the contract with Webster, referred to in the answer, and that Wright should have become surety; that Webster would pay to plaintiff every indebtedness or liability then existing, or thereafter incurred. Neither the bond nor the agreement provides or implies that the plaintiff and Webster might not change the terms of contract existing between them. The law imposes no restriction upon such change in the absence of any valid agreement that it shall not be made. Frank *vs.* Edwards, 8 Exch., 214; Sanderson *vs.* Aston, 8 Law Rep., Exch., 73. It is claimed, however, that it was agreed between the plaintiff and surety that the liability of the latter should be measured by an agreement made contemporaneously with the execution of the bond between plaintiff and Webster. We have already seen that the bond and the agreement have no necessary relation to or dependence upon each other. Each in itself constituted a distinct and complete agreement; neither in any manner refers to the other. If any relationship exists between them, it must be established by parol testimony. This is what the plaintiff claims the right and asks that he may do; he claims that he may show by parol, for it does not appear in any other manner, that

the contract between plaintiff and Webster enters into and measures the extent of his contract with plaintiff; in other words, that he did not agree that Webster should perform the conditions named in the bond, but simply that he should perform certain other conditions mentioned in a separate contract. It is clear that if this is permitted, a contract will be substituted for the bond in many respects essentially different from what the bond upon its face imports. This certainly would violate the rule that 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' True, the contract which it is sought to inject into the bond is in writing, but the fact that it was intended to constitute a part of the bond, if it appears at all, can appear only by parol testimony. We feel satisfied that the bond can not be so modified or varied. If the surety deemed a continuation of the terms of the agreement between the plaintiff and Webster material, he should have stipulated for such continuation in the bond."

Respectfully submitted.

SIMON WOLF,
MYER COHEN,
EUGENE A. JONES,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 168.—October Term, 1906.

J. Charles McGuire and William McGuire, Plaintiffs in Error,
vs.
Louis Gerstley and William Gerstley, Surviving Partners of the Firm trading as Rosskam, Gerstley & Company.

In error to the Court of Appeals of the District of Columbia.

[February 25, 1907.]

The defendants in error, who were the plaintiffs below, and are hereafter so called, brought an action in the Supreme Court of the District of Columbia on December 10, 1904, against the plaintiffs in error and others, hereafter called the defendants, on a bond, and obtained a judgment, which was entered February 24, 1905, for $5,000 and interest thereon from that date. On appeal the Court of Appeals of the District affirmed the judgment, (26 App. D. C. 193,) and the defendants (the two McGuires) brought the case here by writ of error.

The declaration in the action alleged the execution of a bond by all of the defendants in the action dated the 11th day of September, 1903, which bound the defendants in the sum of $5,000, to be paid to the plaintiffs, subject to the condition therein stated. The recital in the bond was that Monaghan and J. Charles McGuire were desirous of purchasing merchandise from plaintiffs, "now and from time to time hereafter, which the said John F. Monaghan and J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase," and the condition was as follows:

"That if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley & Company for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void, otherwise it shall remain in full force and virtue."

The defendants John F. Monaghan and J. Charles McGuire were principals, and the other defendants, William McGuire and John W. Clark, were sureties. Clark sued out a separate writ of error, which is hereafter disposed of. It was further alleged in the declaration that on the days set forth in the particulars of demand annexed, and which formed part of the declaration, the defendants Monaghan and J. Charles McGuire

purchased from the plaintiffs merchandise aggregating the sum of $14,497.16; that they had paid on account thereof, at various times, as shown in said particulars of demand above mentioned, the sum of $9,100.48, leaving a balance overdue and unpaid amounting to $5,396.68, which it was averred the defendants had not paid or caused to be paid to the plaintiffs, and that the whole balance was still due to the plaintiffs, to their damage of $5,000, with interest, besides costs.

The statement annexed to the declaration showed merchandise sold to the defendants by the plaintiffs, commencing September 24, 1903, through almost every month from that time up to and including July 27, 1904, and amounting to the total sum stated in the declaration. The credit side of the demand also showed payments by the defendants from and including October 27, 1903, up to and including November 11, 1904, and amounting to the sum stated in the declaration and leaving a balance due as stated therein.

Judgment by confession was obtained against the defendant Monaghan for $5,000, with interest and costs. The defendants J. Charles McGuire, one of the principals in the bond, and William McGuire, one of the sureties therein, filed two joint pleas to the declaration, and the defendant William McGuire subsequently filed three separate pleas, and still later three additional pleas.

The plaintiffs first demurred to the joint pleas of the defendants J. Charles McGuire and William McGuire and to the three separate pleas of the defendant William McGuire. They thereafter filed a demurrer to the three additional pleas of defendant William McGuire which had subsequently been filed. Both demurrers were sustained, and, the defendants refusing to amend their pleas, final judgment was entered against them.

The first (so numbered in the record) joint plea of defendants J. Charles McGuire and William McGuire alleged the indebtedness of the plaintiffs to the defendants John F. Monaghan and J. Charles McGuire in the sum of $10,000, because that on the 25th of August, 1903, the plaintiffs entered into an agreement with Monaghan and J. Charles McGuire, (the two principals in the bond,) by which the plaintiffs agreed that if the principals would form a copartnership for carrying on in the District of Columbia a wholesale liquor dealer's business, and deal in spirituous liquors to be furnished by the plaintiffs, and would also furnish to plaintiffs a bond in the sum of $5,000, with the defendants Clark and William McGuire as sureties, conditioned for the payment to the plaintiffs of the amount of the indebtedness to be incurred by Monaghan and McGuire in the purchase by them from the plaintiffs, from time to time, of such merchandise, that then, in consideration thereof, the plaintiffs would sell and furnish to Monaghan and McGuire, whenever requested by them, from

time to time, at and for certain prices then specified and agreed upon by the parties to that agreement, the merchandise required in said business and so to be requested, and would allow to them for the goods so requested and required a continuous credit of $10,000, and that they should sell such merchandise to their customers in said business upon such terms as to time and otherwise as they should find and believe to be the best terms obtainable, having in view the establishment and maintenance in said District of a demand for the plaintiffs' goods, and that the said Monaghan and McGuire would not be required to pay for the goods so sold to their customers until they could make collections therefor from their said customers. It was then further understood by and between all the parties to the said agreement, and as part thereof, that said Mongahan and McGuire would enter upon said business without means or capital to sustain the same other than the continuous credit aforesaid, and that, in order to perform their part of said agreement, they would be required to make sales of said merchandise to their customers on credit to be paid for by said customers in periods varying according to circumstances, as stated. The plea then set up that on the date first mentioned (August 25, 1903) the said Monaghan and McGuire formed a copartnership for the purpose stated, and thereafter furnished to the plaintiffs a bond (the one in suit) prepared by the plaintiffs and which the plaintiffs accepted, and the defendants then entered upon and fully established the business mentioned and in all respects performed their said agreement, so far as they were permitted by the plaintiffs to perform the same. That they had obtained a large number of customers, to wit, from 70 to 80, at great labor and expense, to whom they sold on the terms mentioned goods purchased by them from the plaintiffs, and that from the 24th day of September, 1903, to the 10th day of December, 1903, the plaintiffs furnished to Monaghan and McGuire, from time to time under said agreement, merchandise amounting in the aggregate to $10,617.55, which they in turn sold to their customers, excepting only a portion of said merchandise which they returned to and which was accepted by the plaintiffs. That the plaintiffs on the 10th day of December, 1903, wrongfully and with the intent to destroy the business so established and to sell goods directly to said customers drew on said Monaghan and McGuire for the sum of $1,500 on their said account and sent through various banks the draft to them, and on the 11th of December, 1903, the plaintiffs wrongfully refused to furnish merchandise to the above-named defendants at the price stated, but demanded a large increase over those prices, and on the 13th day of January, 1904, wrongfully refused to furnish more goods under said agreement or further to perform said agreement, and forced the said Monaghan and McGuire to abandon their said business, which they had established at great expense, to wit, an expense of not less than

$10,000 and in which their profits were very great; whereby the plaintiffs wrongfully destroyed the credit and business of said Monaghan and McGuire and violated the agreement of August 25, 1903, and the said Monaghan and McGuire were and each of them was thereby injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claims judgment against the plaintiffs; and the defendants aver that they are willing that the same may be set off against the plaintiffs' demand.

The second joint plea of the same defendants (so numbered in the record) set up in substance the same agreement as the first, except that agreement was alleged to have been made September 11, 1903, and the bond was conditioned for the payment by the principals for all merchandise to be furnished by the plaintiffs on four months' credit. The plea also omitted the agreement that the principals (Monaghan and McGuire) would not be required to pay the plaintiffs until they (the principals in the bond) could make collections from their customers. The plea also alleged that the plaintiffs, shortly after the execution of the bond in suit, wrongfully refused to sell to the principals therein merchandise on credit to the amount of $10,000 at and for the prices stated in the agreement, and wholly neglected and refused to perform the agreement between them and the principals in the bond, whereby Monaghan and McGuire were forced to abandon their said business and lose all the money and time expended by them in and about the same, and amounting to not less than $10,000, and were and each of them was injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claimed judgment against the plaintiffs, and the defendants were willing that the same should be set off against the claim of plaintiffs.

Thereafter the defendant William McGuire filed three separate pleas. The first separate plea (numbered 1 in the record) alleged an indebtedness of the plaintiffs to William McGuire in the sum of $5,000, for that, on the 11th day of September, 1903, and in consideration of plaintiffs agreeing to sell merchandise to Monaghan and McGuire at and for certain prices named in the agreement, and to give them a continuous credit of $10,000 for merchandise sold to them by plaintiffs, the defendants did agree to and did sign the bond mentioned in the declaration, but the plaintiffs wrongfully refused to perform the agreement or to sell to Monaghan and McGuire merchandise at the prices named in the agreement or to allow them the continuous credit mentioned therein, whereby they were prevented from paying for the merchandise purchased and mentioned in the declaration, and the defendant thereby incurred great liability and was injured and damaged in the sum of $5,000, and claimed judgment therefor, and was willing that the same might be set off against the demand of plaintiffs.

The second separate plea (numbered 2 in the record) set forth the same agreement and bond and consideration therefor that is mentioned in the first separate plea, and added that the plaintiffs, on December 11, 1903, and, again, on the 23d day of March, 1904, without the knowledge or consent of the defendant, entered into other agreements with Monaghan and McGuire to sell to them, at different prices and terms of sale, the merchandise purchased from plaintiffs by them, and that since December 11, 1903, the plaintiffs have refused to sell merchandise to Monaghan and McGuire at the prices named in the agreement, though requested to do so, whereby the defendant was discharged from his liability.

The third separate plea (numbered 3 in the record) alleged that the merchandise mentioned in the declaration as having been sold was purchased by the defendants Monaghan and McGuire under an agreement not under seal entered into before and since the 11th day of September, 1903, between them and the plaintiffs, and not according to the terms of the bond mentioned in the declaration, wherefore the defendant prayed judgment if he ought to be charged with the said debt by virtue of said bond.

Subsequently the same defendant filed three additional pleas. By the first additional plea (which is numbered 4 in the record) he alleges that prior to signing the bond plaintiffs agreed with the principals therein to sell the merchandise referred to in the bond at and for certain prices specified in a letter dated August 25, 1903, sent by the plaintiffs to the principals in the bond. The plaintiffs represented to the defendant that the agreement was applicable to all merchandise to be purchased under the bond, and plaintiffs thereby intended to induce defendant to sign the bond, which he did in reliance upon that statement. Thereafter the principals purchased from the plaintiffs merchandise amounting to $14,477.16 and no more, and the sum of $10,617.55 was for merchandise purchased at the prices agreed upon, and the balance, $3,859.61, was for merchandise purchased at greatly enhanced prices, made under an agreement entered into on or about the 11th day of December, 1903, without the knowledge or consent of defendant; that the principals paid plaintiffs on account of said sum of $10,617.55 the sum of $9,100.48, leaving due to the plaintiffs under the bond $1,517.07 and no more.

By the second additional plea (numbered 5 in the record) the defendant set up substantially the same agreement as to signing the bond and the consideration therefor, and then made the additional averment that the agreement was that the plaintiffs would not at any time exceed the sum of $10,000 in their sales to the principals, but the plaintiffs failed to perform the conditions, or any of them, and refused to sell at the agreed prices, and also permitted the indebtedness of the principals to continue from Decem-

ber 10, 1903, to January 21, 1904, to be greatly in excess of $10,000, by all of which defendant was discharged.

By the third additional plea (numbered 6 in the record) the defendant alleged the partnership agreement between the principals in the bond, but did not allege that there had been any time ever agreed upon for the continuance of such partnership, and further alleged that during the year 1903 the principals in the bond had established a good business, and the bond was executed and delivered to the plaintiff for the purpose of establishing and maintaining the credit of the principals with the plaintiffs; but that, on or about January 12, 1904, the plaintiffs, for the purpose of securing the customers which the principals in the bond had obtained for themselves, and for the purpose of selling directly to those customers, wrongfully induced Monaghan to withdraw from the partnership and enter the employ of plaintiffs, which Monaghan did, and that thereby the business of the principals was wholly destroyed, and by reason thereof they were unable to pay for the merchandise referred to in the bond and declaration, all of which was without the knowledge or consent of the defendant, by reason whereof defendant was discharged from all liability under the bond.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The declaration in this case is attacked by the defendants under the rule that the court will go back to the first substantial defect appearing in the pleadings before the filing of the demurrer. The criticism made by the defendants upon the declaration is that it does not sufficiently show a violation of the terms of the bond. The defendants say the bond limits the liability of the sureties to pay for such merchandise only as was sold on a four months' credit, and that the declaration does not show that the terms of the sale of the merchandise were those which were set forth in the bond. The declaration shows a failure to pay for certain merchandise alleged to have been sold to the defendants, amounting to a stated sum on the dates set forth in the particulars of demand, which demand was annexed to and forms a part of the declaration. This demand showed that the last item of sale was made July 27 prior to December 11, 1904. The condition of the bond meant that the defendants should not be called upon to pay until after the expiration of four months from the date of each of the respective purchases. The defendants had, as the pleadings show, paid for all the merchandise purchased, except the balance therein stated, and four months had in fact elapsed since the last sale. The defendants have, therefore, obtained four months after the purchase before they were called upon to pay. We think the declaration was sufficient.

We are also of opinion that the two joint pleas of J. Charles McGuire and William McGuire, and the first separate plea of the latter, which it is contended set up offsets to the plaintiffs' claim, did not allege facts with sufficient distinctness to constitute a defense to the action. Neither of these pleas is sufficiently distinct to constitute a good pleading. What the special agreement was that is alleged to have been made between the principals in the bond and the plaintiffs, in consideration of which the bond was signed by the surety, is not stated with any degree of particularity. It simply states that the agreement in this respect was that the merchandise should be sold to the principals in the bond at and for certain prices specified in the agreement, but the pleas do not set them forth, nor do they state for how long a time such agreement was to remain in existence, nor how the defendants suffered damage to the extent named in the pleas, or to any extent. It is impossible for a court to see how these damages would necessarily or probably flow from a violation of said agreement, or that they could form a basis for any legal demand flowing from not longer fulfilling the terms of the alleged contract. The damages alleged in the pleas are most remote, vague and shadowy in their nature, such as could not have been contemplated by any party to the alleged agreement, as the probable result of its violation. While rules of pleading have become more liberal in modern days, yet in order to found a cause of action on the alleged shortcomings of another, they must at least be so far plainly set up as to show actual damage and the wrongful act of the other party as the proximate and natural cause. The particulars of the alleged resulting damages should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague or shadowy, but might and probably would naturally result from the acts complained of. Within such limitations, which have always existed, the three pleas are insufficient.

The next succeeding plea is marked in the record the second separate plea of the defendant William McGuire. The court below treated this plea, together with the third separate plea of the defendant, and his fifth (in truth, the second) additional plea, as together resting upon common ground. We think they may be properly so regarded. It is seen from the whole record that the principals in the bond sued on were expecting to have business transactions with the plaintiffs, by purchasing from them liquors, which they expected to sell to others at profit, but the plaintiffs did not care to sell the goods to these principals without some security for payment of the goods sold when cash payment was not exacted. The bond in suit was thereupon agreed to be given as security for the payment of the merchandise to be sold by the plaintiffs to the principals, and which the principals were bound to pay for in four months after the date of each respective purchase. This is a clear and separate contract between the

plaintiffs and the signers of the bond, and there is nothing in the declaration or bond which shows the existence of any other agreement than that mentioned therein, or that an alteration in the prices of the goods sold to the principals by the plaintiffs could, or would, have any effect upon the liability of the sureties. The bond being complete in itself on its face, it cannot be seen that any future alteration of the prices for the sale of the merchandise, arrived at between the plaintiffs and the principals in the bond, would be material to or alter the liability of the sureties for the payment of the merchandise sold and delivered at the prices agreed upon, after four months from the date of purchase. There is no allegation in these pleas that any separate agreement was in writing, and the bond itself does not show the existence of any other agreement or the sale of the property upon any other conditions than those mentioned in the bond itself. Under such circumstances evidence by parol going to show any other agreement between the principals of the bond and the plaintiffs would not be admissible. (*Seitz* v. *Brewers' &c. Co.*, 141 U. S. 510; *Domestic Sewing Machine Co.* v. *Webster*, 47 Iowa, 357.) In holding these pleas insufficient we think the court below was right.

This leaves the fourth (the first additional) and the sixth (the third additional) pleas. The fourth plea alleges that the merchandise referred to in the bond was to be sold at and for certain prices specified in a letter dated August 25, 1903, and sent by plaintiffs to Monaghan and McGuire. What those prices were is not stated in the plea, while the representations alleged in the plea to have been made, that the agreement was applicable to all merchandise to be purchased under the bond, would require parol evidence, as there is no pretense that these representations were made in writing or that the letter referred to them in any way. The same consideration existing in regard to the pleas last mentioned would operate here and render the plea insufficient.

The third additional plea (marked 6 in the record) attempts to set up a cause of action against the plaintiffs because, as alleged, they induced the defendant Monaghan to dissolve the partnership between him and McGuire and to enter the plaintiff's employ, for the purpose, on plaintiff's part, of increasing the plaintiff's profits and with intent to wrongfully destroy the business of the defendants Monaghan and McGuire. As the court below well says, there is in this plea no allegation as to how long the partnership was to continue, and no action would lie for terminating or inducing the termination of a partnership at will. (*Karrick* v. *Hannaman*, 168 U. S. 328, 333.) We do not see how any legal damage to the sureties under such circumstances can be said to be the proximate, natural or probable result of such action on the part of the plaintiffs. After the dissolution of the partnership of course no sales could thereafter be made, and in relation to sales already

made with credit according to the terms of the bond, it is impossible to see how it could be said that the ruin of the business of the principals of the bond, and hence the damage to the sureties could be regarded as the probable consequence of the act of the plaintiffs in procuring Monaghan to dissolve the partnership and enter their employ. Whether treated as an offset or recoupment, or simply as an independent cause of action, the plea does not set up facts sufficient to constitute a valid set-off, recoupment or cause of action.

The judgment of the Court of Appeals was right and is

Affirmed.

No. 169.

John W. Clark, Plaintiff in Error,
vs.
Louis Gerstley and William Gerstley, Surviving Partners of the Firm trading as Rosskam, Gerstley & Company.

In error to the Court of Appeals of the District of Columbia.

[February 25, 1907.]

Mr. Justice PECKHAM delivered the opinion of the Court.

The defendants in error, plaintiffs below, obtained judgment against the plaintiff in error for $5,000 and interest in April, 1905, in the Supreme Court of the District of Columbia, which judgment was affirmed by the Court of Appeals, (26 App. D. C. 205,) and the plaintiff in error has brought the case here for review.

It is the same action as the foregoing case, just decided, but the plaintiff in error, who was one of the sureties in the bond, separately filed special pleas to the declaration, which were separately demurred to, and the Supreme Court sustained the demurrer. On appeal to the Court of Appeals the demurrer was not disposed of at the same time as the demurrers to the other pleas in the case, but was postponed to a subsequent time, April 7, 1905. On that date the demurrer was sustained and the judgment previously entered affirmed against this plaintiff in error, who then brought the case here on a separate writ of error.

The special pleas filed by the plaintiff in error were seven in number, the first six being the same as filed by the other plaintiffs in error in the case. The seventh set up the failure of the plaintiffs to give notice to the